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Attempts To Liberalize International Trade In Agriculture and the Problem of the External Aspects of the Common Agricultural Policy of the European Economic Community

by J. Kodwo Bentil*

The major trading nations of the world have, hitherto, been mostly concerned with liberalizing international trade within the legal framework of the General Agreement on Tariffs and Trade (GATT),¹ by reducing or doing away with tariff and non-tariff barriers to trade in industrial or manufactured goods.² In that respect, the world's major trading nations have, over the years, achieved some measure of success. The same is not true of reduction or removal of barriers to international trade in agricultural products; such efforts have been lacking in political will and economic seriousness and have become, legally and practically, inconsequential. Yet, for developed as well as developing countries, agricultural products account for an important part of their exports.³ For example, in 1983, international trade in agricultural products was worth \$270 billion, which exceeded the value of international trade in motor vehicles and chemicals that year.⁴

The recent GATT Tokyo Round declaration that the principles and codes of conduct, agreed upon by the GATT contracting parties,⁵ would be applicable not only to international trade in industrial or manufactured goods, but also to world trade in agricultural products, may not have been realized. The principal GATT trading nations have not translated the declaration into practice, so far as international trade in agricultural products is concerned. The drafters of the GATT Tokyo Round

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¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

² See, e.g., *The World Strikes Back*, THE ECONOMIST, Aug. 1, 1981, at 45. "In the past, the big trading areas—the EEC, Japan, the U.S. and Canada—have been more concerned about trade in manufactures than about agriculture." *Id.*

³ GATT ACTIVITIES IN 1973, at 30 (1974); GATT ACTIVITIES IN 1975, at 26 (1976).

⁴ *Bring Free Trade to the Farm*, THE ECONOMIST, Nov. 24, 1984, at 73.

⁵ Action by the Contracting Parties on the Multilateral Trade Negotiations, Nov. 28, 1979, GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter cited as GATT, BISD] 201 (26th Supp. 1978-79).

declaration may have assumed that particular conditions would come to prevail which, in turn, would insure its proper application. Particularly, it appears to have been assumed that individual national or regional governments would adhere to the principles and codes of conduct agreed upon at the Tokyo Round of multilateral trade negotiations regarding international trade in agricultural products and that they would leave the traditional agricultural markets of their trading partners undisturbed. Despite their apparent desire to liberalize international trade in agricultural products, the GATT's major trading nations have been actuated by their economic and political self-interest into frustrating proper implementation of the declaration. Not surprisingly, one commentator has recently observed of the situation that the GATT needs "to do something about swinish behaviour in world markets for agricultural goods," and that, "[p]rotectionist barriers, subsidies and pork-barrel politics have for too long stunted trade in farm products."⁶

The European Economic Community (EEC) is one of the few major trading blocs of the world. Consequently, the way and manner in which it formulates and implements its law and policy regarding farming and trade in farm products impinges on international trade in agricultural products. While the EEC can justifiably claim that its record on liberalizing international trade in industrial or manufactured goods is highly impressive,⁷ its record on liberalizing world trade in agricultural products is less virtuous.⁸

The establishment and operation of the EEC's Common Agricultural Policy (CAP) has hitherto been treated as economically and politically objectionable by various GATT Contracting Parties. However, in practice, the objections tend to be rather subdued as long as operation of the CAP has little or no impact on international trade in agricultural products of non-EEC countries. One apt observation of the situation is that "[t]he rest of the world agreed not to challenge the community's agricultural policy during the GATT Tokyo Round, but only so long as the EEC did not use export subsidies to expand beyond its existing markets."⁹ Unfortunately, events have taken such a turn that the EEC's CAP has undermined the international agricultural trade of various non-EEC countries by a significant poaching of their traditional overseas markets.¹⁰ This has given rise to numerous trade disputes between the

⁶ *Bring Free Trade to the Farm*, *supra* note 4.

⁷ "During the Tokyo Round of GATT Multilateral Trade Negotiations, the EEC reduced the weighted average of its tariff for finished manufactures, for example, to 6.9 percent, compared with 8.3 percent for Canada and 5.7 percent for the United States." *The World Strikes Back*, *supra* note 2, at 45.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

EEC and some of its major trading partners. In some instances, the EEC's major trading partners have sought or threatened to take retaliatory trade measures against the EEC. The economic uncertainty and instability which this state of affairs has generated in international trade relations cannot be ignored.

This article examines some of the essential aspects of the problem of the EEC's CAP against the general background of the efforts of the world's trading nations to liberalize international trade in agricultural products. At the outset, it is appropriate to pay some attention to various background events and factors relating to international efforts to liberalize world trade in agricultural products. The various efforts to liberalize such trade within the general legal framework of the GATT will be considered and the viability and the likely impact of the relevant envisaged corrective measures will be examined and assessed.

I. General Background Considerations and Factors

Unique characteristics of trade in agriculture, not present in the manufacturing industry, create problems for nations and groups of nations globally. Individual government intervention to protect a country's agricultural sector from alleged or perceived foreign encroachment is a common practice and has long been a normal feature of economic and social policies in, for example, North America, Europe and Australia.¹¹ The policy has presented particular problems of inequity in GATT to those countries, both developed and developing, for which agriculture is an important source of income.¹²

Individual government subsidies to farmers result in high prices for agricultural products, well above world market levels, and in order to maintain these prices the governments must resort to price controls or restrictions on imports.¹³ The subsidies often lead to surpluses of agricultural products, which are then marketed abroad, creating an economic disadvantage for efficient agriculture producing countries.¹⁴

In light of the continued intervention in agriculture by individual governments, it is not surprising that the liberalization of world trade in agriculture is slow in coming and lags behind that of the industrial sector. Only in the last two of the major rounds of GATT multilateral trade

¹¹ See, e.g., Castle, *International Policy on Agricultural Trade: A Proposal for Butter*, 4 J. COMMON MKT. STUD. 47, 49 (1965); Dam, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209 (1967).

¹² GATT ACTIVITIES IN 1967/68, at 11 (1969). See also GATT ACTIVITIES IN 1969/70, at 17 (1970); GATT ACTIVITIES IN 1970/71, at 16 (1972); GATT ACTIVITIES IN 1972, at 15 (1973); GATT ACTIVITIES IN 1973, at 30-32 (1974); GATT ACTIVITIES IN 1974, at 24-26 (1975); GATT ACTIVITIES IN 1976, at 22-23 (1977); GATT ACTIVITIES IN 1977, at 23-24 (1978).

¹³ GATT ACTIVITIES IN 1969/70, *supra* note 12, at 17

¹⁴ *Id.*

negotiations,¹⁵ the Kennedy Round, and the Tokyo Round, has any significant attention been given to the liberalization of world trade in agricultural products.

A. The Kennedy Round and the Problem of Barriers to International Trade in Agricultural Products

While the four principal GATT multilateral trade negotiations preceding the Dillon Round of 1960-61 barely touched upon the problem of barriers to international trade in agricultural products,¹⁶ the Dillon Round did direct attention to the problem.¹⁷ Although no concrete results were reached at the Dillon Round, it did become apparent that the issue could not be ignored at subsequent GATT Rounds and as a result, it was highlighted at the Kennedy Round. Some tangible results materialized during the Kennedy Round, towards the liberalization of world trade in agriculture. However, they did not match the successful results in the industrial sector,¹⁸ despite the fact that the United States in particular emphasized the importance of the reduction of barriers to trade in agriculture.¹⁹

Theoretically, the same rules and procedures of the GATT are applicable to the regulation of international trade in agricultural products and manufactured goods.²⁰ In practice, these rules and procedures are often waived in regulating trade in agricultural products.²¹ Unlike the regulation of trade in manufactured goods, the escape clauses in the GATT which allow individual governments in certain circumstances to act in derogation of the rules and procedures, are more easily applied to international trade in agricultural products.²²

¹⁵ The tariff negotiating conferences held in Geneva, Switzerland in 1947, in Annecy, France in 1949, in Torquay, England in 1951, in Geneva in 1956, and 1960 and 1961 (the Dillon Round, and during 1964-67 (the Kennedy Round), and 1973-79 (the Tokyo Round).

¹⁶ However, the GATT followed the example of the Food and Agricultural Organization (FAO) of the United Nations in 1955, when it formulated procedures by which governments of the GATT trading nations could notify and consult one another on disposal of surpluses of agricultural products likely to undermine world trade in such products. The idea behind this was to avoid disruption of world agricultural markets which the disposal of those surpluses tended to cause. See GATT ACTIVITIES IN 1969/70, *supra* note 12, at 20.

¹⁷ See *Free Trade for Farmers*, THE ECONOMIST, Dec. 11, 1982, at 18; *Bring Free Trade to the Farm*, *supra* note 4.

¹⁸ See *The Kennedy Round*, 1 J. WORLD TRADE L. 475, 476 (1967).

¹⁹ Dam, *supra* note 11, at 256.

²⁰ See, e.g., *Bring Free Trade to the Farm*, *supra* note 4.

²¹ *Id.*

²² GATT ACTIVITIES IN 1969/70, *supra* note 12, at 18: "For agricultural and fisheries products, unlike industrial goods, the [GATT] does not prohibit import restrictions where these are necessary to enforce a government programme that limits the marketing or production of domestic products." *Id.*

The GATT Trade Negotiations Committee²³ stated that the Kennedy Round "should provide for acceptable conditions of access to world markets for agricultural products in furtherance of a significant development and expansion of world trade in such products."²⁴ In pursuit of its objective, on March 18, 1965 the Trade Negotiations Committee adopted negotiation procedures²⁵ which had been formulated by the committee on Agriculture.²⁶ Pursuant to the adopted procedure, the trade negotiations were to proceed on the basis of specific offers on trade in individual agricultural products.²⁷

Regarding international trade barriers, the agreements finally reached, particularly those concerning the exports of the less developed Third World countries, only established general guidelines and positions for future GATT trade negotiations.²⁸ From the general standpoint of the need to reduce or remove barriers to international trade in agricultural products, the Kennedy Round trade negotiations turned out to be very disappointing.²⁹ Hardly any agreement was reached on the fundamental issue of acceptable conditions of access to world markets for agricultural commodities."³⁰

However, agreements were reached on two main matters incidental to the conduct of international trade in grains. First, it was agreed that, in a future international wheat agreement, the minimum and the maxi-

²³ The Trade Negotiations Committee was composed of the leading representatives of all the countries which had expressed an intention to participate in the Kennedy Round. That Committee was charged with supervising the conduct of the Kennedy Round multilateral trade negotiations.

²⁴ THE ACTIVITIES OF GATT 1964/65, at 19 (1965). This pious projection was appropriately described by a leading international economist as "a vague phrase indicating the intention to impose some sort of rules on what has frequently been the equivalent of jungle warfare." See *The Kennedy Round*, *supra* note 18, at 476-77.

²⁵ THE ACTIVITIES OF GATT 1964/65, *supra* note 24, at 19.

²⁶ *Id.* The Committee on Agriculture was established by the Trade Negotiations Committee in June, 1963.

²⁷ *Id.*

²⁸ See, e.g., *The Kennedy Round*, *supra* note 18, at 475.

²⁹ For a similar assessment, see, e.g., Wheeler, *Governmental Intervention in World Trade in Wheat*, 1 J. WORLD TRADE L. 379, 395 (1967); *The Kennedy Round*, *supra* note 18, at 478.

³⁰ Note, however, that some decisions were adopted for the purpose of reducing tariffs on a few agricultural or quasi-agricultural products, such as canned fruit, wine, whisky, hops and tobacco. Even then, the tariff reductions were hardly significant and had a minimal effect on stimulating international trade in the agricultural products involved. Wheeler, *supra* note 29, at 395. See also K. RYAN, INTERNATIONAL TRADE LAW 34-35 (1975).

mun price should be increased by about 12 percent.³¹ The idea behind this was to ensure that prices for wheat and wheat flour remained stable in the international market and that the incomes of wheat producers would become more realistic and viable. Secondly, an agreement was reached providing for 4.5 million metric tons of grain to be distributed annually over a three year period as food aid for the Third World Countries.³² Apart from the agreements reached on grains, attention was also directed to international trade in meat. Yet the best that was achieved as to meat was the mere conclusion of various bilateral agreements between some of the GATT Contracting Parties.³³

Despite the recalcitrant attitudes of certain major GATT Contracting Parties, the EEC appears to have been most to blame for the failure of the Kennedy Round of multilateral trade negotiations concerning effective and adequate tackling of the problem of barriers to international trade in agricultural products.³⁴ First, the EEC was in the process of establishing its CAP and therefore was unwilling to accept substantial reductions in its level of agricultural trade protection. Secondly, the EEC felt that negotiations needed to be aimed at the gradual reduction of "the total" government support to the agricultural sector, particularly

³¹ Wheeler, *supra* note 29, at 395.

³² In this context, participating countries were committed to contributing wheat and coarse grains, or the cash equivalent thereof, as aid to the Third World developing countries. The United States was committed to contribute 42%, Canada to 11%, the EEC to 23%, Australia to 5%, the United Kingdom to 5%, Japan to 5%, Sweden to 1.2%, Switzerland to 0.7%, Denmark to 0.6%, Argentina to 0.5%, Finland to 0.3%, and Norway to 0.3% of the total amount fixed. REVIEW OF THE WORLD WHEAT SITUATION 1966/67, at 69 (1967).

The provisions governing the agreement, which were incorporated into the International Grains Arrangement of 1967, were negotiated under the auspices of the International Wheat Council. The International Grains Arrangement was established following the International Wheat Conference held in Rome from July 12 to August 18, 1967. The conference was attended by 53 countries and the EEC. The Arrangement adopted consisted of two separate legal instruments: The Wheat Trade Convention, which dealt with the stabilization of the international market for wheat and wheat flour, and the Food Aid Convention. Both legal instruments came into effect by July 1, 1968. The separate Wheat Trade Convention constituted a natural successor to the long line of International Wheat Agreements concluded since 1949. See REVIEW OF THE WORLD WHEAT SITUATION 1966/67, *supra*, at 64-65.

The International Wheat Council is an independent international commodity trade regulatory body established by the International Wheat Agreement of 1949, as subsequently retained under respective renegotiated International Wheat Agreements. It consists of the representatives of countries that are significant exporters and importers of wheat and wheat flour. It has its headquarters in London and is responsible for ensuring a stabilization of prices for wheat and wheat flour in international trade and for assuring supplies of such products to importing countries and markets.

The food aid agreement rationalized the much bemoaned practice of disposing of grain surpluses in international markets and was to spread the cost of the aid among the developed market economies. *The Kennedy Round*, *supra* note 18, at 478. See also M. VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 102 (2d ed. 1971).

³³ *The Kennedy Round*, *supra* note 18, at 478.

³⁴ See, e.g., M. VAN MEERHAEGHE, *supra* note 32, at 101.

regarding barriers to imports and other forms of support such as subsidies.³⁵

Despite its failure to resolve fairly and adequately the essential problem of barriers to international trade in agricultural products, the Kennedy Round prepared the way for more serious and propitious consideration of the problem at the next major GATT multilateral trade negotiations.³⁶ From a purely legal and procedural standpoint, the Kennedy Round had established some basic trade negotiation rules and mechanisms which would be pressed into service during the next major GATT round. However, recourse to such expertise was not bound to guarantee success with respect to the negotiation of substantive international agricultural trade issues.

B. The Tokyo Round Negotiations and the Problem of Barriers to World Trade in Agricultural Products

Unlike any previous major GATT round of multilateral trade negotiations, the Tokyo Round negotiations dwelt, at considerable length on the problem of barriers to international trade in agricultural products. Consequently, it merits more thorough examination and evaluation. It is necessary to divide the examination into three main parts, namely: 1) developments from 1967 to 1973 before the actual Tokyo Round negotiations; 2) the Tokyo Declaration and subsequent trade negotiations regarding the agricultural sector; and 3) results of the Tokyo Round in relation to the agricultural sector.

1. Developments from 1967 to 1973 Before the Actual Tokyo Round Negotiations

After the Kennedy Round it became apparent that GATT had to do more in the area of barriers to agricultural trade. As part of a long term plan, it looked at the fundamental problems concerning agricultural trade and began to plan the bringing about of better conditions which would lead to commercial competition in farm product markets.³⁷ To this end, in 1967 the GATT's Agriculture Committee was charged with establishing a program to tackle these barrier problems.³⁸

By 1968 the Agriculture Committee had completed its documentation of the issues.³⁹ It began studying the structure of actual markets and the production policies of each nation.⁴⁰ More specifically, the Commit-

³⁵ *Id.*

³⁶ *The Kennedy Round*, *supra* note 18, at 479-80.

³⁷ GATT ACTIVITIES IN 1967/68, *supra* note 12, at 11.

³⁸ *Id.*

³⁹ *Id.* at 12.

⁴⁰ *Id.*

tee studied measures affecting exports of farm products, imports of farm products, and details of national policies for agricultural production.⁴¹ By 1969 the Committee was in a position to begin looking at solutions in each area.⁴² To this end, the GATT Secretariat, in a move that received much support, made a plea for national discipline in controlling agricultural production and cooperation with other countries.⁴³

Consequently, as a prelude to the envisaged major GATT negotiations, four main categories of negotiation techniques and modalities were examined.⁴⁴ First, specific measures covering the reduction, relaxation or elimination of certain identified types of barriers to international agricultural trade were examined.⁴⁵ In that regard, attention was given to the impact of export aids, tariffs, variable levies, quantitative restrictions, and health and sanitary regulations.⁴⁶ Second, attention was given to a general measures approach through which measures could be devised for alleviating some of the problems of international agricultural markets and through which codes of good conduct could be examined.⁴⁷ Third, common criteria for the assessment of commitments assumed by GATT Contracting Parties with respect to the agricultural sector were considered. Fourth, a combination of techniques by which the disadvantages of one technique could be offset by the advantages of another were examined.⁴⁸ As a result, various proposals were formulated.

Obviously, the preparatory work of the Agriculture Committee tended to be concentrated on barriers to international trade in temperate agricultural products. Yet barriers to international trade in tropical agricultural products were of great concern to the Third World countries. Fortunately, the latter problem came to receive equal attention, although on a separate basis. Thus, in the GATT Preparatory Committee and GATT Ministerial meeting it was agreed that in the foreshadowed major GATT multilateral trade negotiations, timely attention must be given to problems in international trade in tropical agricultural products in raw, semi-processed and processed forms.⁴⁹ To that end, studies were done to provide the participants in the trade negotiations with statistical data and analytical documentation regarding international trade in coffee, cocoa, tea, bananas, pepper, vegetable oils, and other products.⁵⁰ Thus, a clear

⁴¹ Dairy products, cereals, meat, vegetables, fruit, vegetable oils and oil seeds, raw tobacco, and wine. See GATT ACTIVITIES IN 1969/70, *supra* note 12, at 19.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ GATT ACTIVITIES IN 1972, *supra* note 12, at 17.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 17-18.

⁴⁹ GATT ACTIVITIES IN 1973, *supra* note 3, at 34.

⁵⁰ *Id.*

picture emerged of the existing trade flows on a most favored nation and on a preferential basis, as well as of the relevant tariff and non-tariff measures applied in developed market economies, regarding those products.⁵¹

2. The Tokyo Declaration and Subsequent Trade Negotiations Regarding the Agricultural Sector

The Kennedy Round had failed to address the removal of agricultural trade barriers, resulting in continuation of the existing trade problems.⁵² The topic of barrier removal became of great concern to the farming nations contracting under GATT.⁵³ Therefore, international trade in farm products was one of the specific negotiation topics under the Tokyo Declaration.⁵⁴

The negotiations faced the complex problem of stabilizing prices and markets while also guaranteeing regular and adequate supplies. Adding to the problem was a background of conflicting signals from the markets themselves. From the 1950s through the 1970s there had been a surplus of farm products⁵⁵ due to technological innovations and the interventionist policies of governments.⁵⁶ This gave rise to the "accumulation of costly stocks . . . closing-off of markets, and price wars in the decreasing number of those that remained open."⁵⁷ The supply of farm products outstripped demand. Yet, due to deliberate government programs limiting farm output, demand had outstripped supply by the mid to late 1970s.⁵⁸ This situation was made worse by many unexpected crop failures.⁵⁹

The negotiators also had the concerns of each contracting party to consider. They were urged to "take into account special problems of the farm sector."⁶⁰ Agriculture was of great importance to the Third World countries and special deference was given them and their major export, tropical farm products.⁶¹ A special subgroup of the Trade Negotiations Committee was set up to look into the problems concerning tropical farm

⁵¹ *Id.*

⁵² GATT ACTIVITIES IN 1974, *supra* note 12, at 24.

⁵³ *See id.* at 24-25.

⁵⁴ GATT ACTIVITIES IN 1975, *supra* note 3, at 26.

⁵⁵ GATT ACTIVITIES IN 1974, *supra* note 12, at 25.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 26.

⁵⁹ *Id.*

⁶⁰ GATT ACTIVITIES IN 1976, *supra* note 12, at 22.

⁶¹ GATT ACTIVITIES IN 1974, *supra* note 12, at 27. *See also* GATT ACTIVITIES IN 1975, *supra* note 3, at 32; GATT ACTIVITIES IN 1976, *supra* note 12, at 30; GATT ACTIVITIES IN 1977, *supra* note 12, at 30.

products.⁶²

There was also the problem of dealing with the larger, more developed countries. Being the two largest participants, any disagreement between the EEC and the United States would be a major stumbling block. For example, the United States wanted to negotiate farm and manufactured goods together. The EEC felt negotiations on farm products needed their own rules and mechanisms.⁶³ The United States also wanted to alter the EEC's policy of subsidized exports and variable tariffs on imports.⁶⁴ In 1977 the two sides agreed that farm negotiations would be conducted separately, but would proceed parallel to other negotiations concerning manufactured goods.⁶⁵

The rules and measures being devised for reducing barriers to international trade in both manufactured and agricultural goods were expected to be capable of altering, supplementing or strengthening, within the legal framework of the GATT, those rules already established.⁶⁶ It is therefore necessary to outline the essential features of the negotiations concerning international trade in specific agricultural products.

The Tokyo Round multilateral trade negotiations sought to address not only the rules and measures necessary for reducing or eliminating various tariff barriers, but also those required for controlling non-tariff barriers. The negotiations on tariff cuts on industrial imports were aimed at a targeted level of reduction.⁶⁷ The same could hardly be said of the negotiations over tariff cuts on farm product imports. Arguably, the dismantling of tariff barriers on imported farm products may have been thought of as warranting only gradual and modest implementation. The habit of individual governments to grant export subsidies in order to ensure their own economic protection is common knowledge. The distorting effect of this measure on international trade cannot be denied. Although the applicable provisions of the GATT were supposed to prevent or control the practice,⁶⁸ the efficacy of these provisions became doubtful. The same could be said of the provisions of the GATT which regulate the imposition of countervailing duties in respect of subsidized imports.⁶⁹

Consequently, the Tokyo Round focused attention on rules and pro-

⁶² See, e.g., GATT ACTIVITIES IN 1974, *supra* note 12, at 28.

⁶³ *Informational Report of the Committee on International Economic Organizations*, 11 INT'L LAW. 211, 213 (1977).

⁶⁴ *Id.*

⁶⁵ GATT ACTIVITIES IN 1977, *supra* note 12, at 24.

⁶⁶ GATT ACTIVITIES IN 1980, at 5 (1981).

⁶⁷ A reduction of about one-third of that which was achieved in the Kennedy Round of GATT multilateral trade negotiations.

⁶⁸ GATT, *supra* note 1, at A51, T.I.A.S. No. 1700. at 47, 55 U.N.T.S. at 250 (art. XVI).

⁶⁹ *Id.* at A23, T.I.A.S. No. 1700 at 19, 55 U.N.T.S. at 212 (art. VI).

cedures needed to buttress the applicable provisions of the GATT.⁷⁰ The area of subsidies and countervailing duties are governed by separate provisions of the GATT. However, the two are linked in practice because countervailing duties are applied to offset subsidies.⁷¹ The area of subsidies and countervailing duties was recognized as one of the most difficult among the various areas of multilateral trade negotiations and it was also recognized as one of the most important in the Tokyo Round negotiations.⁷² Therefore, not surprisingly, efforts made by the negotiators in 1977 to reach agreement on a negotiating framework failed to materialize. Moreover, by the beginning of 1978, the parties had yet to agree upon a document that could serve as a basis for negotiating on the two related subjects.⁷³

The industrialized countries sought to emphasize negotiations to limit subsidies of farm products.⁷⁴ The Third World was also interested in these negotiations.⁷⁵ They had found subsidies a necessary evil to protect their infant industries. Towards this end, they advanced a proposal concerning more explicit rules on subsidies and countervailing duties.⁷⁶

Regarding technical barriers to trade, the applicable provisions of the GATT regulating the practices involved⁷⁷ were not adequate. The need for greater international discipline of such practices became widely recognized.⁷⁸ Consequently, the negotiating countries began to examine a Draft Code of Conduct for Preventing Technical Barriers to Trade, which set out rules on the application of technical standards in international trade.⁷⁹ The Third World countries became particularly active in this area, seeking provisions in the Draft Code that would meet their special needs.⁸⁰

Legitimate recourse to import licensing procedures was acknowledged, but their inappropriate formulation and enforcement was considered an obstacle to proper conduct of international trade. Consequently, the negotiating countries set about seeking ways and means of ensuring simplification of such procedures, and of ensuring their administration in a rather neutral and fair manner.

The provisions of the GATT applicable to customs valuation had

⁷⁰ Most industrialized countries suggested a code or interpretative note to supplement the relevant GATT provisions. See GATT ACTIVITIES IN 1976, *supra* note 12, at 20.

⁷¹ *Id.* at 20; See also GATT ACTIVITIES IN 1977, *supra* note 12, at 21.

⁷² GATT ACTIVITIES IN 1977, *supra* note 12, at 21.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ GATT ACTIVITIES IN 1976, *supra* note 12, at 21.

⁷⁶ *Id.*

⁷⁷ GATT, *supra* note 1, at A28, T.I.A.S. No. 1700 at 24, 55 U.N.T.S. at 218 (art. VIII).

⁷⁸ GATT ACTIVITIES IN 1976, *supra* note 12, at 18.

⁷⁹ GATT ACTIVITIES IN 1977, *supra* note 12, at 19.

⁸⁰ *Id.*

sought to bring some order into its operation,⁸¹ yet this was not entirely successful and the need for stronger applicable GATT provisions became apparent. Consequently, the Tokyo Round negotiations directed attention to the need for common international rules⁸² as a means of avoiding disparities or inconsistencies between different government systems. The negotiations on the subject became more concrete in November, 1977, when the EEC submitted a draft customs valuation code.⁸³ Subsequently, the draft code was accepted by most of the negotiating countries as a basis for future work on the subject.⁸⁴

As a result of the Kennedy Round of multilateral trade negotiations of 1964-67, a general GATT Anti-Dumping Code had been adopted.⁸⁵ Dumping is the practice by which "products of one country are introduced into the commerce of another country, at less than the normal value of the products."⁸⁶ It is of special concern where the practice causes or threatens to cause material injury to an established industry in an importing country or materially militates against the establishment of a domestic industry in an importing country. Any measure for countering the practice becomes an anti-dumping one. The GATT Anti-Dumping Code, adopted at the end of the Kennedy Round negotiations, contained various discrepancies and needed revising.⁸⁷ The Tokyo Round negotiations set about the necessary revision. In particular, it was imperative that any revised version of that Code be brought into line with any forthcoming GATT regime for the regulation of subsidies and countervailing duties.⁸⁸ Mainly this would prevent apparent or likely inconsistencies in the application of the provisions of the new GATT regime and those of a revised GATT Anti-Dumping Code. The special position of the Third World developing countries was taken into account by the Tokyo Round negotiators.

3. Results of the Tokyo Round in Relation to the Agricultural Sector

The Tokyo Round of multilateral trade negotiations was concluded

⁸¹ GATT, *supra* note 1, at A25, T.I.A.S. No. 1700 at 21, 55 U.N.T.S. at 216 (art. VII).

⁸² GATT ACTIVITIES IN 1976, *supra* note 12, at 20; GATT ACTIVITIES IN 1977, *supra* note 12, at 19-20.

⁸³ GATT ACTIVITIES IN 1977, *supra* note 12, at 19.

⁸⁴ *Id.* at 19-20. While some major trading nations already had customs valuation based on the so-called Brussels Definition of Value, others failed to follow suit. *Id.* at 20. There were also important differences of view and practice between some of those trading nations. *Id.*

⁸⁵ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1979, 19 U.S.T. 4348, T.I.A.S. No. 6431, 651 U.N.T.S. 320 [hereinafter cited as the GATT Anti-Dumping Code].

⁸⁶ *Id.*

⁸⁷ GATT ACTIVITIES IN 1973, *supra* note 12, at 42.

⁸⁸ GATT ACTIVITIES IN 1979, at 25 (1980).

in November, 1979.⁸⁹ Agreements were reached for an improved legal framework for the conduct of world trade, on tariff cuts⁹⁰ and on the regulation of non-tariff barriers to international trade. Regarding the agreements on regulation of non-tariff barriers, the following must be noted: Agreement on Technical Barriers to Trade;⁹¹ Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT;⁹² Agreement on Implementation of Article VII of the GATT⁹³ with an Accompanying Protocol;⁹⁴ Agreement on Import Licensing Procedures;⁹⁵ and Agreement on Implementation of Article VI of the GATT.⁹⁶ All of the agreements adopted regarding both tariff and non-tariff barriers "apply to world trade in farm products, as well as to industrial products."⁹⁷ Incorporated into all of the agreements reached were provisions ensuring special and more favorable treatment for the Third World countries.⁹⁸

At the same time, two other agreements were reached, relating to the regulation of international trade in specific agricultural products. These were the Arrangement Regarding Bovine Meat⁹⁹ and the International Dairy Arrangement¹⁰⁰ (the latter was accompanied by a Protocol Regarding Certain Milk Powders¹⁰¹ and a Protocol Regarding Milk Fat).¹⁰² Furthermore, specific agreements were reached between individual developed market economies and the Third World countries as to grants of trade concessions and contributions regarding world trade in tropical farm products.¹⁰³ Most of the agreements covering the latter were reached even before the Tokyo Round negotiations were concluded.¹⁰⁴ Thus, trade concessions and contributions regarding tropical

⁸⁹ GATT ACTIVITIES IN 1980, *supra* note 66, at 8.

⁹⁰ Geneva (1979) Protocol to the General Agreement on Tariffs and Trade, GATT, BISD 3 (26th Supp. 1978-79); Protocol Supplementary to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade, GATT, BISD 5 (26th Supp. 1978-79).

⁹¹ GATT, BISD 8 (26th Supp. 1978-79).

⁹² Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 18 I.L.M. 579 [hereinafter cited as the Code on Subsidies and Countervailing Duties].

⁹³ GATT, BISD 116 (26th Supp. 1978-79). This is the Code on Customs Valuation.

⁹⁴ Protocol to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, GATT, BISD 151 (26th Supp. 1978-79).

⁹⁵ *Id.* at 154.

⁹⁶ GATT Anti-Dumping Code, *supra* note 85.

⁹⁷ GATT ACTIVITIES IN 1978, at 43 (1979); GATT ACTIVITIES IN 1979, *supra* note 88, at 27.

⁹⁸ See, e.g., Code on Subsidies and Countervailing Duties, *supra* note 92, at art. 14.

⁹⁹ GATT, BISD 84 (26th Supp. 1978-79).

¹⁰⁰ *Id.* at 91.

¹⁰¹ *Id.* at 101.

¹⁰² *Id.* at 107.

¹⁰³ GATT ACTIVITIES IN 1978, *supra* note 97, at 49-50.

¹⁰⁴ GATT ACTIVITIES IN 1976, *supra* note 12, at 29-33.

farm products to developed countries, already promised by Australia, the EEC, Finland, New Zealand, Norway, Sweden, and Switzerland, became effective in early January, 1977.¹⁰⁵ Additionally, Canada and Japan gave effect to their concessions and contributions from the beginning of April, 1977, while Austria followed suit in July, 1977.¹⁰⁶ The United States offered concessions on a most favored nation (MFN) basis regarding various tropical farm products.¹⁰⁷ In this latter context, consultations were geared to implementing the offers began in 1976 between the United States and interested developing countries. Consultations continued in 1977 while, at the same time, the United States signed an agreement with Mexico.¹⁰⁸

No doubt the results of the Tokyo Round of multilateral trade negotiations regarding the liberalization of world trade in both industrial goods and agricultural products were, on paper, very impressive. The Commission of the European Communities (EC Commission), in its report to the Council of the European Communities (EC Council), concerning the overall results of the Tokyo Round, regarded such results as "both substantial and balanced" from the standpoint of the EEC.¹⁰⁹ In particular, on the Tokyo Round's results regarding the liberalization of world trade in agricultural products, the EC Commission had occasion to observe:

Substantial progress has also been made in ensuring greater stability and better market opportunities for agricultural products and in ending the warfare which has raged intermittently over the last two decades over the implications for world trade of the [EEC's] common agricultural policy. The agreement reached and the general consultative mechanism to be set up will substantially contribute to the stability of world markets while avoiding any threat to the principles and mechanism of the [EEC's] common agricultural policy.¹¹⁰

Yet, this has not been particularly borne out since the various agreements adopted at the conclusion of the Tokyo Round of multilateral negotiations have come into force. While the binding legal character of the instruments incorporating the agreements is not controverted, the actual implementation of the agreements themselves, regarding the liberalization of world trade in agricultural products, can hardly be said to have been substantial or impressive. Consequently, the efficacy of the agreements is questionable. Perhaps the comprehensive and complex charac-

¹⁰⁵ *Id.* at 29-30; GATT ACTIVITIES IN 1977, *supra* note 12, at 29.

¹⁰⁶ GATT ACTIVITIES IN 1977, *supra* note 12, at 29.

¹⁰⁷ See GATT ACTIVITIES IN 1976, *supra* note 12, at 33; GATT ACTIVITIES IN 1977, *supra* note 12, at 29.

¹⁰⁸ See GATT ACTIVITIES IN 1977, *supra* note 12, at 29.

¹⁰⁹ *Tokyo Round: Substantial and Balanced Results*, 12 BULL. EUR. COMM. 7 (No. 10 1979).

¹¹⁰ *Id.* at 8.

ter of such agreements accounted for this state of affairs. Reference is made to the following pertinent observation of the secretariat of the GATT: "While the results of the previous six rounds of multilateral trade negotiations in GATT were largely 'self-executing' in that they mostly concerned automatic, phased tariff cuts, implementation of the Tokyo Round agreements—covering a much broader and more complex field—will require permanent monitoring, interpretation and negotiation."¹¹¹

C. Legal Status and Force of GATT Provisions and Agreed Measures vis-à-vis the EEC

As a multilateral treaty, the GATT is legally binding on the Contracting Parties. Equally, obligations assumed under GATT and measures established in pursuance of its objectives and principles have binding legal force on the Contracting Parties and are, therefore, to be implemented by the respective governments. The individual Member States of the EEC were original Contracting Parties to the GATT and, therefore, bound by the provisions of and obligations imposed by the GATT and its related legal instruments. However, the subsequent establishment and operation of the European Common Market changed all that. The EEC replaced its individual Member States in relation to the observance of the provisions, of and the commitments under, the GATT. After all, the treaty establishing the EEC¹¹² (Treaty of Rome) has endowed it with a legal personality.¹¹³ The Treaty of Rome empowered the competent authorities of the EEC to base the EEC's common commercial policy on uniform principles, particularly regarding changes in tariff rates, tariff and trade agreements, achievement of uniformity in measures of trade liberalization, export policy, and measures for protecting trade, such as those to be taken in the event of dumping or subsidies.¹¹⁴

In the earlier EEC joined cases of *International Fruit Co. N.V. and Others v. Produktschap voor Groenten en Fruit (No.3)*,¹¹⁵ the EC Court clarified the position of the EEC in terms of the GATT. The EC Court stressed that substitution of the EEC for its individual Member States regarding commitments under the GATT took place on July 1, 1968, following the introduction of the Common Customs Tariff. This has

¹¹¹ See GATT ACTIVITIES IN 1980, *supra* note 66, at 8.

¹¹² Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome].

¹¹³ *Id.* at 86 (art. 210).

¹¹⁴ *Id.* at 60 (art. 113). This also provides for recommendations to be made by the EC Commission to the EC Council, so that the latter may authorize the former to open any necessary commercial negotiations, when agreements with non-EEC countries on trade matters need to be negotiated.

¹¹⁵ 1972 E. Comm. Ct. J. Rep. 1219, 16 Comm. Mkt. L.R. 1.

been affirmed by the EC Court in the more recent EEC joined cases of *Amministrazione Delle Finanze Dello Stato v. SPI and SAMI*,¹¹⁶ which was referred to the EC Court for a preliminary ruling by the Corte Suprema di Casazione of Italy. In the latter joined cases, the EC Court proceeded to indicate how important it was for the GATT provisions of all arrangements binding on the EEC to receive uniform application throughout the Member States of the EEC.¹¹⁷ The EC Court pointed out that the GATT Protocols of 1962 and 1967, following the Dillon and the Kennedy Rounds of GATT multilateral trade negotiations, respectively, were acts of the institution of the EEC and, therefore, could be ruled upon by the EC Court vis à vis the individual Member States of the EEC.¹¹⁸

Obviously, the rulings of the EC Court in the foregoing joined cases apply with equal force to the agreements and measures adopted at the end of the Tokyo Round of multilateral trade negotiations. Apart from such rulings of the EC Court, there is secondary EEC legislation which treats the Tokyo Round agreements and measures as legally binding on the EEC and its Member States. Thus, by a Decision¹¹⁹ of the EC Council of December 10, 1979, *Concerning the Conclusion of the Multilateral Agreements Resulting from the 1973 to 1979 Trade Negotiations*,¹²⁰ the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade,¹²¹ the Protocol Supplementary to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade,¹²² and the various other agreements reached at the Tokyo Round of multilateral trade negotiations were approved on behalf of the EEC.

II. THE ESTABLISHMENT AND OPERATION OF THE EEC'S CAP AND THE CONDUCT OF WORLD TRADE IN FARM PRODUCTS

Politically and technically, the conception and the establishment of the EEC's CAP was an admirable exercise of skill and diplomacy.¹²³ Yet, it has been the most difficult and controversial economic regime of the EEC to operate, especially in view of the often conflicting interests of

¹¹⁶ 1983 E. Comm. Ct. J. Rep. 801, 39 Comm. Mkt. L.R. 354.

¹¹⁷ *Id.* at 828, 39 Comm. Mkt. L.R. at 377.

¹¹⁸ *Id.* at 829, 39 Comm. Mkt. L.R. at 378-79.

¹¹⁹ Under Article 189 of the Treaty of Rome, a decision of either the EC Council or the EC Commission has binding legal force vis-à-vis those to whom it is addressed. Treaty of Rome, *supra* note 112, 298 U.N.T.S. at 227.

¹²⁰ 23 O.J. EUR. COMM. (No. L 71) 1 (1980).

¹²¹ GATT, BISD 3 (26th Supp. 1978-79).

¹²² *Id.* at 5.

¹²³ Dam, *supra* note 11, at 264.

the individual Member States.¹²⁴ The observation has been aptly made:

The common agricultural policy (CAP) is Europe's proudest achievement, and its prodigal son. By boosting output too successfully, it has generated surpluses that are costly to store and dump and that make the EEC's trading partners livid. And now it infuriates farmers too, by not propping up their incomes as much as they would like.¹²⁵

The operation of the CAP has drawn a great deal of criticism and hostility not only from non-EEC countries, but also from some of the individual Member States of the EEC itself.

Although foreign resentment of, or antagonism towards, the operation of the CAP in its initial stages may have been restrained, this is no longer the case. This observation has been made of the U.S. attitude towards the situation: "The Americans once viewed Europe's common agricultural policy . . . with scornful detachment. The EEC was free to waste money on whatever it liked, the argument ran, so long as it did not hurt American interests in the process. But America is no longer a bystander."¹²⁶

The need for some drastic changes in the CAP and its operation could not be denied. The EC Commission itself has maintained that "[t]wenty years after the common agricultural policy was set up, there is an objective need for reform."¹²⁷ Despite various proposals submitted by the EC Commission to the EC Council for a radical reform of the CAP,¹²⁸ no proposals have yet been adopted and given legal force. Consequently, the CAP continues to operate in virtually its original form, albeit with some de facto changes in its budget operation relating to activities concerning two EEC farm product sectors.¹²⁹ It is, therefore, an unreformed CAP which is examined here. The examination is divided into three parts: noteworthy legal features and essential objective of the CAP, the CAP's operation in relation to the development of the Euro-

¹²⁴ See D. LASOK & J. BRIDGE, *INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 324 (3d ed. 1982).

¹²⁵ *Down on the Farm*, *THE ECONOMIST*, Oct. 23, 1982, at 52.

¹²⁶ See *Europe's Farmyard Follies*, *THE ECONOMIST*, Apr. 17, 1982, at 16.

¹²⁷ See *Rationalization of the Common Agricultural Policy: the Commission's Proposals*, 16 BULL. EUR. COMM. 7 (No. 7/8 1983).

¹²⁸ See, e.g., *Guidelines for European Agriculture*, BULL. EUR. COMM. 63 (Supp. 4 1981); *Agricultural Prices and Related Measures for 1984/85: Commission Proposals*, 17 BULL. EUR. COMM. 7 (No. 1 1984); *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, 17 BULL. EUR. COMM. 10 (No. 3 1984); see also *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7.

¹²⁹ Unlimited price guarantees are becoming a thing of the past. European farmers are beginning to pay part of the cost of disposing of their surpluses by accepting lower prices for their excess production. This has been the case for sugar for some time, and more recently and to a limited extent, for dairy products. The principle may soon be applied to cereals.

The Next Transatlantic War, *THE ECONOMIST*, Nov. 20, 1982, at 33.

pean Common Market, and the operation of the CAP and its impact on world trade in farm products.

A. *Noteworthy Legal Features and Essential Objectives of the CAP*

The economic and social importance of agriculture to the individual Member States of the EEC is such that the founders of the EEC could not have left it out of the general scheme of the projected move towards European integration.¹³⁰ The Treaty of Rome extended the functioning of the European Common Market to embrace agriculture and trade in agricultural products.¹³¹ Products of the soil, stockfarming, and fisheries, both in their raw states and first stages of processing, are subsumed under the general heading of "agricultural products."¹³² The drafters of the EEC Treaty realized that, from the beginning, the operation and development of the common market for agricultural products must be accompanied by the establishment of the CAP.¹³³ The CAP would then be superimposed on the national agricultural policies of the individual Member States of the EEC. In other words, the individual Member States of the EEC would no longer operate their own separate national agricultural policies that would conflict with or derogate from the CAP. Consequently, the general principle of the primacy of EEC laws and measures over those of the individual Member States of the EEC has been applied regarding the operation of the CAP.¹³⁴

The primacy of EEC law has been underlined by the EC Court in various cases. In the earlier EEC cases of, for example, *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollmann*,¹³⁵ and *Hauptzollamt Bremen-Freihafen v. Waren-Import-Gesellschaft Krohn & Co.*,¹³⁶ as well as in the more recent EEC joined cases of *Procureur du Roi v. Charles Kefer and Louis Delmelle*,¹³⁷ the EC Court did not hesitate to highlight the significance of the primacy of EEC law. The EC Court pointed out that, to the extent that the Member States of the EEC had assigned legislative powers in tariff matters to the EEC, to ensure the proper operation of the common agricultural market, they no longer had the power to

¹³⁰ See, e.g., P. KAPTEYN & P. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 315-16 (1973); D. LASOCK & J. BRIDGE, *supra* note 124, at 373-74; K. LIPSTEIN, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 67 (1974); Marsh & Swanney, *The Common Agricultural Policy*, in INSTITUTIONS AND POLICIES OF THE EUROPEAN COMMUNITY 54 (J. Lodge ed. 1983).

¹³¹ Treaty of Rome, *supra* note 112, 298 U.N.T.S. at 30 (art. 38).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Benthil, *Legal Aspects of EEC Agriculture*, 118 SOLIC. J. 670 (1974); Benthil, *Agricultural Law: Offer and Acceptance-I*, 124 NEW L.J. 245 (1974).

¹³⁵ 1970 E. Comm. Ct. J. Rep. 69, 9 Comm. Mkt. L.R. 141.

¹³⁶ 1970 E. Comm. Ct. J. Rep. 451, 9 Comm. Mkt. L.R. 466.

¹³⁷ 1980 E. Comm. Ct. J. Rep. 103, 34 Comm. Mkt. L.R. 77.

enact national laws in the same field.¹³⁸ Furthermore, the EC Court has ruled that all EEC secondary legislative measures for implementing the various aspects of the CAP are incapable of being modified, varied or derogated from by the Member States of the EEC.¹³⁹ The EC Court maintains that the provisions of the Treaty of Rome governing the establishment and the operation of the CAP take precedence, in the event of any discrepancy, over the other rules regarding the establishment and operation of the European Common Market.¹⁴⁰

The CAP is aimed at ensuring an increase in agricultural productivity by promoting technical progress, rational development of agricultural production, and optimum utilization of production factors, especially labor. In this way, the standard of living of all EEC farmers and farmworkers would be raised, particularly the individual earnings of the latter.¹⁴¹ The CAP has as an objective, the stabilization of agricultural markets in the EEC.¹⁴² It is not only the interests of EEC agricultural producers that the Treaty of Rome seeks to protect. The Treaty also seeks to protect the interests of EEC consumers of farm products by ensuring that supplies of farm products are secure and available at reasonable prices.¹⁴³

¹³⁸ *Id.* at 113, 34 Comm. Mkt. L.R. at 86.

¹³⁹ See *Commission of the European Communities v. France*, 40 Comm. Mkt. L.R. 516 (1984); *Commission of the European Communities v. Germany*, 1983 E. Comm. Ct. J. Rep. 1173; *SA Nicolas Corman & Fils v. Hauptzollamt Hamburg-Jonas*, 1983 E. Comm. Ct. J. Rep. 1627; *Bundesanstalt für landwirtschaftliche Marktordnung v. Bruggen*, 1982 E. Comm. Ct. J. Rep. 4647; *H.P. Klughardt oHG v. Hauptzollamt Hamburg-St. Annen*, 1982 E. Comm. Ct. J. Rep. 4291; *Debayser SA v. Fonds d'Intervention et de Regularisation du Marché du Sucre*, 1981 E. Comm. Ct. J. Rep. 1291; *Adorno v. Commission of the European Communities*, 1981 E. Comm. Ct. J. Rep. 1469, 37 Comm. Mkt. L.R. 310; *Commission of the European Communities v. Italy*, 1980 E. Comm. Ct. J. Rep. 1411; *SA Roquette Frères v. French State Customs Administration*, 1980 E. Comm. Ct. J. Rep. 2917; *Providence Agricole de la Champagne v. Office National Interprofessionnel des Céréales*, 1980 E. Comm. Ct. J. Rep. 2823; *Criminal Proceedings v. Grosoli*, 1979 E. Comm. Ct. J. Rep. 2621; *Pigs and Bacon Commission v. McCarren & Co.*, 1979 E. Comm. Ct. J. Rep. 2161, 26 Comm. Mkt. L.R. 389; *Commission of the European Communities v. France*, 1977 E. Comm. Ct. J. Rep. 515, 20 Comm. Mkt. L.R. 161; *Società SADAM v. Comitato Interministeriale dei Prezzi*, 1976 E. Comm. Ct. J. Rep. 323, 20 Comm. Mkt. L.R. 183; *Tasca*, 1976 E. Comm. Ct. J. Rep. 291; *Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo*, 1976 E. Comm. Ct. J. Rep. 45; *Galli*, 1975 E. Comm. Ct. J. Rep. 47, 15 Comm. Mkt. L.R. 211; *Fratelli Grassi fu Davide v. Italian Finance Administration*, 1972 E. Comm. Ct. J. Rep. 443, 12 Comm. Mkt. L.R. 322; *R. & V. Haegeman v. Commission of the European Communities*, 1972 E. Comm. Ct. J. Rep. 1005, 12 Comm. Mkt. L.R. 365; *Pubblico Ministero della Repubblica Italiana v. Società Agricola Industria Latte*, 1972 E. Comm. Ct. J. Rep. 119, 11 Comm. Mkt. L.R. 723; *Commission of the European Communities v. Italy*, 1970 E. Comm. Ct. J. Rep. 93, 10 Comm. Mkt. L.R. 466.

¹⁴⁰ *Pigs Marketing Board v. Redmond*, 1978 E. Comm. Ct. J. Rep. 2347, 24 Comm. Mkt. L.R. 177.

¹⁴¹ Treaty of Rome, *supra* note 112, 298 U.N.T.S. at 30 (art. 39(1)).

¹⁴² *Id.*

¹⁴³ *Id.*

The drafters of the Treaty of Rome may have had in mind the idea of the EEC enjoying some measure of self sufficiency in food production.¹⁴⁴ Now, about 90% of the EEC's output of farm products is covered by the CAP.¹⁴⁵ Thus, the EC Commission found it necessary in 1981 to make it clear that the EEC "could no longer grant unlimited price guarantees because it had gone past the stage of self-sufficiency and outlets were unreliable."¹⁴⁶ One may ask whether the time has not come for a shift of emphasis from the Treaty's concern with protection of the economic interests of EEC farmers. The EC Commission has confronted the latter issue and seeks to provide an answer to it. In its proposals for reforming the CAP, the EC Commission takes the following view:

The keynote consists in placing responsibility on the producers and stressing production at competitive prices. This means that Community farming will have to accept more of the market pressure to which other economic sectors are subject. Only in this way will the Community be able to develop its exports and maintain its share of the world market.¹⁴⁷

The Treaty of Rome expects various socioeconomic factors to be taken into account in establishing the means by which the CAP is to operate. Thus, the particular nature of agricultural activity which results from the social structure of agriculture and from structural and natural disparities between the various farm regions of the EEC, the desire to effect appropriate changes in the EEC's system of agriculture in a gradual, rather than in a sudden, manner, and the fact that agriculture in the individual Member States of the EEC constitutes one of the main sectors of the economy, ought to be taken into account.¹⁴⁸ One may ask whether in the actual operation of the CAP, the competent authorities of the EEC may not have overlooked some hard economic realities. Small wonder, therefore, that the EC Commission, in its proposals for reforming the CAP, considers the objective of such proposals as being the adaptation of the CAP to the new realities of the 1980's.¹⁴⁹

B. The CAP's Operation in Relation to the Development of the European Common Market

The Treaty of Rome created a customs union on the basis of which

¹⁴⁴ Bentil, *Agricultural Law: Offer and Acceptance I*, *supra* note 134, at 246.

¹⁴⁵ *Down on the Farm*, *supra* note 125, at 52. The only major farm products not covered by the CAP are potatoes and agricultural alcohol.

¹⁴⁶ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7.

¹⁴⁷ *Id.* at 8.

¹⁴⁸ Treaty of Rome, *supra* note 112, at art. 39(2).

¹⁴⁹ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7.

the European Common Market was established and developed.¹⁵⁰ Under the EEC's customs union, the Member States of the EEC are required, first, to abolish between themselves, customs duties and quantitative restrictions on the import and export of goods, as well as other measures having equivalent effects.¹⁵¹ Second, they are required to observe a common customs tariff and a common commercial policy vis-à-vis imports from non-EEC countries.¹⁵² The establishment and operation of the CAP presupposes the existence of the customs union for the EEC.¹⁵³ Therefore, the CAP requires the Member States of the EEC to abolish between themselves, all customs duties, quantitative restrictions and measures having equivalent effects on imports of agricultural products into their national territories. The observance of such an economic/legal norm is not meant to prevail in all situations as there may be circumstances in which a derogation from it is permissible.¹⁵⁴

The Treaty of Rome also provides for the establishment of a common organization of agricultural markets in the EEC as a means of attaining the objectives of the CAP.¹⁵⁵ In this regard, the competent EEC authorities have recourse to various administrative and economic measures. In particular, they may regulate prices for individual agricultural products, grant aid for the production and marketing of different farm products, set up storage and carry-over arrangements for appropriate farm products, and establish a common system for stabilizing imports or exports of farm products.¹⁵⁶ In administering any or some of these measures, discrimination between EEC agricultural producers and consumers is to be eschewed.¹⁵⁷ Equally important is the provision of the Treaty of Rome by which the competent EEC authorities are empowered to establish one or more agricultural guidance and guarantee funds to ensure attainment of the CAP objectives.¹⁵⁸

The first measures for operating the CAP were initiated and brought into effect in 1962. These measures consisted of the progressive establishment of common organization of various agricultural markets in the EEC. Some of the most important ones were established by regulations of the EC Council for the progressive organization of a common market in, for example, cereals¹⁵⁹ and fruits and vegetables.¹⁶⁰ Other regulations

¹⁵⁰ Treaty of Rome, *supra* note 112, at art. 9.

¹⁵¹ *Id.*

¹⁵² *Id.* at art. 3.

¹⁵³ *Id.* at art. 44.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at art. 40 (2).

¹⁵⁶ *Id.* at art. 40 (3).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at art. 40 (4).

¹⁵⁹ Council Regulation (EEC) No. 19, 5 J.O. COMM. EUR. 933 (1962) (Progressive Establishment of a Common Organization of the Market in cereals).

of the EC Council were enacted in 1964 to cover a common organization of the markets in, for example, milk and milk products,¹⁶¹ rice, beef and veal. In 1966, a regulation of the EC Council for the common organization of the market in oils and fats was also promulgated.¹⁶² In 1967, regulations of the EC Council were promulgated regarding the common organization of the markets in pork,¹⁶³ poultry,¹⁶⁴ and sugar,¹⁶⁵ and in 1970 a regulation of the EC Council for the common organization of the market in wine was promulgated.¹⁶⁶ The regulation of the EC Council on the common organization of the market in cereals, in particular, had served as a prototype, although the markets for other agricultural products differed markedly.¹⁶⁷

The common organization of the various agricultural markets in the EEC has made agricultural producers in the individual Member States of the EEC look to an overall EEC controlled or EEC managed agricultural market for returns on their farm produce, rather than to a system of price guarantees or subsidies from their national governments.¹⁶⁸ The overall EEC mechanism is capable of being effectively operated as long as the EEC has the necessary funds for financing it. In the absence of such financing, the control mechanism may break down, leaving a free-for-all situation to be exploited by the national governments of the Member States. In a recent comment on the operation of the CAP, the observation was made that "[t]he Rome treaty prohibits national subsidies that give one set of farmers an unfair advantage. Yet straight national subsidies, flouting the law, are becoming more common as the CAP gets more

¹⁶⁰ Council Regulation (EEC) No. 23, Apr. 4, 1962, 5 J.O. COMM. EUR. 965 (1962), *reprinted in* O.J. EUR. COMM. 97 (Special ed. 1959-62) (Progressive Establishment of a Common Organization of the Market in Fruit and Vegetables).

¹⁶¹ Council Regulation (EEC) No. 13, 7 J.O. COMM. EUR. 7 (1964) (Progressive Establishment of a Common Organization of the Market in Milk and Milk Products).

¹⁶² Council Regulation (EEC) No. 136/66, Sept. 22, 1966, 9 J.O. COMM. EUR. 3025 (1966), *reprinted in* O.J. EUR. COMM. 221 (Special ed. 1965-66) (Establishment of a Common Organization of the Market in Oils and Fats).

¹⁶³ Council Regulation (EEC) No. 121/67, June 13, 1967, 10 J.O. COMM. EUR. 2283 (1967), *reprinted in* O.J. EUR. COMM. 46 (Special ed. 1967) (Common Organization of the Market on Pigmeat).

¹⁶⁴ Council Regulation (EEC) No. 123/67, June 13, 1967, 10 J.O. COMM. EUR. 2301 (1967), *reprinted in* O.J. EUR. COMM. 63 (Special ed. 1967) (Common Organization of the Market in Poultrymeat).

¹⁶⁵ Council Regulation (EEC) No. 1009/67, Dec. 18, 1967, 10 J.O. COMM. EUR. (No. 308) 1 (1967), *reprinted in* O.J. EUR. COMM. 304 (Special ed. 1967) (Common Organization of the Market in Sugar).

¹⁶⁶ Council Regulation (EEC) No. 816/70, Apr. 28, 1970, 13 J.O. COMM. EUR. (No. L 99) 1 (1970), *reprinted in* O.J. EUR. COMM. 234 (Special ed. 1970) (laying down additional provisions for the Common Organization of the Market in Wine).

¹⁶⁷ Bentil, *Legal Aspects of EEC Agriculture*, *supra* note 134, at 671.

¹⁶⁸ *Id.*

strapped for cash.”¹⁶⁹

C. The Operation of the CAP And Its Impact on World Trade in Farm Products

Arguably, in establishing the EEC's CAP, the drafters of the Treaty of Rome may have been actuated more by considerations of EEC self-sufficiency in food and ensuring a free and competitive trade in agricultural products within the European Common Market, than by any likely repercussions that the CAP would have on world trade in agricultural products.¹⁷⁰ The EEC founding fathers may not have realized that the future operation of the CAP would have a significant impact on world trade in farm products. Yet operation of the CAP now impacts greatly on this trade. Two main ways in which this has occurred are examined here. These are: (1) the control or restriction of imports of non-EEC farm products into the European Common Market area, and (2) the granting of export subsidies for EEC farm products destined for non-EEC countries. Each of these two is considered separately.

1. The Control or Restriction of Imports of Non-EEC Farm Products into the European Common Market Area

The rules of the GATT¹⁷¹ and the provisions of some of the agreements reached at the Tokyo Round of Multilateral Trade Negotiations¹⁷² attempt to ensure the removal or elimination of import controls or restrictions; the same rules and provisions, in various situations allow for imposition of such controls or restrictions.¹⁷³ Particularly, in world trade in farm products, individual governments have availed themselves of such permissive rules and provisions for protecting the agricultural sector of their economies. For example, as previously noted, the secretariat of the GATT maintains that the rules and procedural mechanisms of the GATT, which are capable of being applied to regulate barriers to world trade in farm products, hardly prohibit import restrictions. This is especially true when such restrictions are necessary to enforce a govern-

¹⁶⁹ *Down on the Farm*, *supra* note 125, at 52.

¹⁷⁰ *See, e.g., Dam*, *supra* note 11, at 256. "However much the architects of the [CAP] may have wished to isolate it from the world economy, they have not been successful . . . Economic forces aside, events on the world scene have forced the EEC to consider how European agriculture is to fit into world trading patterns." *Id.*

¹⁷¹ GATT, *supra* note 1, at A18, A28, A32, A40, T.I.A.S. No. 1700 at 14, 24, 28, 36, 55 U.N.T.S. at 204, 218, 224, 234 (arts. III, VIII, XI, XIII).

¹⁷² *See supra* note 90. Specifically note the provisions of the general agreement on the control or elimination of tariff barriers to the conduct of international trade.

¹⁷³ GATT, *supra* note 1, at A32, A34, A53, A58, A60, T.I.A.S. No. 1700 at 28, 30, 49, 54, 56 U.N.T.S. at 224, 228, 252, 262 (arts. XI, XII, XVIII, XIX, XX). *See also supra* note 90. Note the provisions of the general agreement on the control or the elimination of tariff barriers which were adopted at the end of the Tokyo Round of Multilateral Trade Negotiations.

ment scheme which limits the production or marketing of domestic farm products.¹⁷⁴

However, the control or restriction of imports of foreign farm products, in a blatant and unjustifiable manner, may constitute a breach of the relevant rules of the GATT and of the relevant provisions of the agreements adopted at the Tokyo Round. Therefore, blatant and unjustifiable import controls or restrictions imposed by, for example, the EEC on non-EEC farm products, may constitute a violation of the relevant rules and provisions of the GATT. However, individual GATT Contracting Parties tend to accept or turn a blind eye to imposition of controls or restrictions of this kind because they themselves have done the same thing.

Therefore, under the CAP the EEC, through its system of imposing variable levies on imports of such non-EEC products, has been able to protect intra-EEC trade in its farm products or products of a similar nature against competitive products from non-EEC countries.¹⁷⁵

The variable import levy system is designed to raise the price of imported non-EEC farm products at least to the level of prescribed EEC prices for the same or similar EEC farm products.¹⁷⁶ Considering that about one quarter of the EEC's farm products¹⁷⁷ lacks an established intervention mechanism to prop it up, the variable import levy system is utilized as the sole means of tariff protection for the farm products involved.¹⁷⁸ The EEC's variable import levy system is a means of keeping cheaper foreign farm products out of the European Common Market so as to bolster the socioeconomic interests of EEC farmers. There has been hardly any strong objection to this policy from non-EEC countries. However, recent EEC attempts to reintroduce duties on corn gluten¹⁷⁹ imported from the United States, which undercut the EEC's own overpriced feed grains, have met with strong opposition from the U.S. Government.¹⁸⁰

The imperative nature of the observance of this area of EEC law has been underlined by the EC Court. The EC Court has sought to impress upon the Member States of the EEC and their respective nationals the need for strict compliance with the requirements of the variable import levy system under the CAP. For example, in *Re Import of Sweet Oranges*:

¹⁷⁴ GATT ACTIVITIES IN 1969/70, *supra* note 12, at 18.

¹⁷⁵ See, e.g., Bentil, *Legal Aspects of E.E.C. Agriculture*, *supra* note 134, at 671.

¹⁷⁶ *Id.* See also *Down on the Farm*, *supra* note 125, at 52-53.

¹⁷⁷ *Down on the Farm*, *supra* note 125, at 53. Specifically flowers, some cereals, good wine, and some fruits and vegetables.

¹⁷⁸ *Id.*

¹⁷⁹ Corn gluten is a cheap source of animal fodder produced in the United States.

¹⁸⁰ *A Sour Message for Mr. Reagan*, THE ECONOMIST, July 3, 1982, at 38; *Down on the Farm*, *supra* note 125, at 52-53.

Government of the Federal Republic of Germany v. EC Commission,¹⁸¹ the EC Court impressed upon the Member States of the EEC that there must be proper compliance with the necessary requirements.¹⁸² In that case, the government of the Federal Republic of Germany requested that the EC Commission free it of external customs duty when importing a quota of sweet oranges from outside the EEC.¹⁸³ When the request was rejected by the EC Commission, the Government of the Federal Republic of Germany appealed to the EC Court asking for an annulment of the decision. The EC Court affirmed the decision of the EC Commission and dismissed the application of the government of the Federal Republic of Germany.¹⁸⁴ In affirming the decision of the EC Commission, the EC Court stressed that a grant of the request might delay the rational evolution of the production of sweet oranges in the EEC and hinder the economic expansion of the less developed regions of southern Italy.¹⁸⁵

The EC Court has upheld the power of the EEC's authorities to impose countervailing duties on farm products imported from non-EEC countries as a means of rationalizing individual EEC agricultural markets established under the CAP. In *R & V Haegeman v. EC Commission*,¹⁸⁶ the EC Court affirmed the EEC's power to impose a countervailing duty on wine imported into the EEC from a non-EEC country, with the obvious intent to protect the wine trade within the European Common Market.¹⁸⁷ The applicant in that case was a Belgian wine importer that imported foreign wines, especially from Greece.¹⁸⁸ The EC Commission imposed a countervailing duty on the wine imported from Greece into the EEC by the applicant firm. The EC applicant applied to the EC Court for an annulment of the EC Commission's decision, on the ground that Greece had entered into an associate relationship with the EEC. The EC Court dismissed the application.¹⁸⁹

The EC Commission is vested with discretionary power to grant exemptions from applying the EEC's external tariff on farm products imported from non-EEC countries. However, the exercise of such discretionary power must take into account various economic factors regarding the EEC's agricultural sector. In *Re Tariff Quota on Wine: Gov-*

¹⁸¹ 1963 E. Comm. Ct. J. Rep. 131, 2 Comm. Mkt. L.R. 369.

¹⁸² *Id.* at 148, 2 Comm. Mkt. L.R. at 395.

¹⁸³ *Id.* at 133, 2 Comm. Mkt. L.R. at 370.

¹⁸⁴ *Id.* at 148, 2 Comm. Mkt. L.R. at 369.

¹⁸⁵ See Bentil, *Legal Aspects of E.E.C. Agriculture*, *supra* note 134, at 671.

¹⁸⁶ 1972 E. Comm. Ct. J. Rep. 1005, 12 Comm. Mkt. L.R. 365.

¹⁸⁷ See Criminal Proceedings against Albert Clement Gerard Ces and Others, 1981 E. Comm. Ct. J. Rep. 3339. The EC Court had occasion to rule on the common organization of the market in wine under the C.A.P. and the prohibition of imports of wine from non-EEC countries.

¹⁸⁸ Greece only became a Member State of the EEC in 1980. Consequently, it was a non-EEC country at the relevant time.

¹⁸⁹ See Bentil, *Legal Aspects of E.E.C. Agriculture*, *supra* note 134, at 671.

ernment of the Federal Republic of Germany v. EC Commission,¹⁹⁰ the EC Court pointed out that before exercising its discretionary power to grant exemption from the EEC external tariff, the EC Commission had to evaluate the state of the market for the product concerned and the difficulties met by the Member States of the EEC in obtaining supplies of it, as well as the likelihood and seriousness of any disturbance which might be caused should the exemption be granted.¹⁹¹

2. The Granting of Export Subsidies for EEC Farm Products Destined for Non-EEC Countries

The EEC's major trading partners and other non-EEC countries did not particularly object to EEC efforts, under the CAP, to control or restrict imports of non-EEC farm products into the European Common Market area. However, they objected to the EEC's grant of subsidies for agricultural products exported to non-EEC countries. Led by the United States, Australia, Brazil, and Argentina, many countries have attacked the EEC's system of export subsidies for its farm products, claiming it depresses world prices of various farm products and enables the EEC to grab an unfair share of world markets.¹⁹² Even Third World countries have attacked the EEC's system of agricultural export subsidies because the subsidies depress world prices for their tropical farm products and reduce their export earnings.¹⁹³

The United States, in particular, views the aspect of the EEC's CAP regarding the granting of agricultural export subsidies "as the most pernicious aspect of the [CAP]."¹⁹⁴ Consequently, the U.S. government would like a GATT investigation into the EEC's system of agricultural export subsidies.¹⁹⁵ Indeed, the "Americans have relaunched a general attack on the EEC's food export subsidies, which are helping European farmers to gain ground in third countries at the expense of American farmers."¹⁹⁶ However, "the EEC never tires of pointing out [that] all governments have for years, and with GATT acquiescence, intervened to manage production and trade in agriculture," and that "[b]oth sides of the Atlantic do it."¹⁹⁷ There is no denying that the EEC's counter charge contains a great deal of truth. Therefore, before proceeding to examine the nature and extent of the EEC's system of export subsidies

¹⁹⁰ 1963 E. Comm. Ct. J. Rep. 63, 2 Comm. Mkt. L.R. 347.

¹⁹¹ Treaty of Rome, *supra* note 112, 298 U.N.T.S. at 182 (art. 25(3)).

¹⁹² See *Down on the Farm*, *supra* note 125, at 52-53; *Throwing Money at Farmers*, THE ECONOMIST Jan. 8, 1983, at 68-69.

¹⁹³ See *supra* note 192.

¹⁹⁴ *The Next Transatlantic War*, *supra* note 129, at 33.

¹⁹⁵ *Id.*

¹⁹⁶ *A Sour Message For Mr. Reagan*, *supra* note 180, at 38.

¹⁹⁷ *The Next Transatlantic War*, *supra* note 129, at 33.

under CAP, it is necessary to examine the applicable rules and mechanisms of the GATT as they relate to the granting of governmental subsidies.

Neither the provisions of the GATT concerning subsidies,¹⁹⁸ nor those of the Code on Subsidies and Countervailing Duties adopted at the Tokyo Round Multilateral Trade Negotiations,¹⁹⁹ seek to prohibit outright the governmental granting of subsidies. Both sets of provisions recognize that subsidies are used by governments to promote important objectives of national policy. However, it is also recognized that subsidies may have harmful effects on trade and production. Consequently, it is not the granting of subsidies which is, ipso facto, deemed objectionable, but rather the harmful effects that subsidies may have on international trade. The Code on Subsidies and Countervailing Duties lays a great deal of emphasis "on the effects of subsidies and that these effects are to be assessed in giving due account to the internal economic situation of the signatories [to the Code] as well as to the state of international economic and monetary relations."²⁰⁰ This rather non-committal exhortation could hardly be said to impose any legal obligation or sanction on individual governments of the GATT that grant subsidies.

On the other hand, the GATT Contracting Parties are keen on ensuring that measures, taken by individual governments to offset the effects of subsidies granted by other governments, are properly controlled in order to prevent international trade wars. Various provisions of the Code on Subsidies and Countervailing Duties are heavily directed toward the problem of the imposition of countervailing duties or measures.²⁰¹ Consequently, various substantive and procedural provisions of the Code are concerned with the circumstances under which countervailing duties or measures may be imposed and the methods by which disputes about any such imposition may be investigated and settled.²⁰² With regard to subsidies, all the Code seems to suggest is that, in granting them, governments should ensure that no harm is occasioned to the trading interests of other countries. Obviously, it is not easy to determine or detect the existence or the extent of governmental subsidies on products traded internationally. Hence, the Code's rather vague approach to the problem. It is hardly surprising, therefore, that one commentator has observed that "[i]n 1980, the GATT negotiators agreed that subsidies for agriculture were unavoidable, and opted to turn a blind eye so long as the subsidies were not used to expand markets beyond traditional shares."²⁰³

¹⁹⁸ GATT, *supra* note 1, at A51, T.I.A.S. No. 1700 at 47, 55 U.N.T.S. at 250 (art. XVI).

¹⁹⁹ Code on Subsidies and Countervailing Duties, *supra* note 92.

²⁰⁰ *Id.* at preamble.

²⁰¹ *Id.* at arts. 1-4.

²⁰² *Id.* at arts. 1-6, 16, 18.

²⁰³ *Europe's Farmyard Follies*, *supra* note 126, at 16.

This means that individual governments are prepared to question the legality or the propriety of granting particular government subsidies should their international trading interest be threatened or harmed by such subsidies. Various trading partners of the EEC have questioned the legality or the propriety of the EEC's system of export subsidies favoring the EEC farmers. The Government of the United States has rightly claimed that EEC export subsidies for EEC farm products are used to expand the EEC's agricultural markets beyond traditional limits, especially in world trade "in both cereals and sugar, as well as a host of smaller markets."²⁰⁴ In examining how this state of affairs has come about, attention should now be turned to the EEC's system of export subsidies for EEC farm products.

Mention has already been made that the Treaty of Rome provides for the granting of aids, within the general framework of the CAP, for the production and marketing of various farm products.²⁰⁵ In the common organization of individual EEC markets in various agricultural products, the competent authorities of the EEC have established a system of export subsidies or refunds for promoting the sale of EEC farm products on the world market. For example, this has been done with EEC exports of colza, rape, and sunflower seed;²⁰⁶ olive oil;²⁰⁷ sugar;²⁰⁸ milk and milk products;²⁰⁹ beef and veal;²¹⁰ fruit and vegetables;²¹¹ raw tobacco;²¹² cereal based compound feedingstuffs;²¹³ products processed from cereals and rice;²¹⁴ cereals;²¹⁵ pork;²¹⁶ eggs;²¹⁷ poultry;²¹⁸ rice;²¹⁹

²⁰⁴ *Id.*

²⁰⁵ Treaty of Rome, *supra* note 112, at art. 40(3).

²⁰⁶ See Council Regulation (EEC) No. 142/67, June 21, 1967, 10 J.O. COMM. EUR. 2461 (1967), reprinted in O.J. EUR. COMM. 94 (Special ed. 1967).

²⁰⁷ See Council Regulation (EEC) No. 171/67, June 27, 1967, 10 J.O. COMM. EUR. 2600 (1967), reprinted in O.J. EUR. COMM. 136 (Special ed. 1967).

²⁰⁸ See Council Regulation (EEC) No. 766/68, June 18, 1968, 11 J.O. COMM. EUR. (No. L 143) 6 (1968), reprinted in O.J. EUR. COMM. 155 (Special ed. 1968).

²⁰⁹ See Council Regulation (EEC) No. 876/68, June 28, 1968, 11 J.O. COMM. EUR. (No. L 155) 1 (1968), reprinted in O.J. EUR. COMM. 234 (Special ed. 1968).

²¹⁰ See Council Regulation (EEC) No. 885/68, June 28, 1968, 11 J.O. COMM. EUR. (No. L 156) 2 (1968), reprinted in O.J. EUR. COMM. 237 (Special ed. 1968).

²¹¹ See Council Regulation (EEC) No. 2518/69, Dec. 9, 1969, 12 J.O. COMM. EUR. (No. L 318) 17 (1969), reprinted in O.J. EUR. COMM. 545 (Special ed. 1969).

²¹² See Council Regulation (EEC) No. 326/71, Feb. 15, 1971, 14 J.O. COMM. EUR. (No. L 39) 1 (1971), reprinted in O.J. EUR. COMM. 76 (Special ed. 1971).

²¹³ See Council Regulation (EEC) No. 2741/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 281) 60 (1975).

²¹⁴ See Council Regulation (EEC) No. 2744/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 281) 65 (1975).

²¹⁵ See Council Regulation (EEC) No. 2746/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 281) 78 (1975).

²¹⁶ See Council Regulation (EEC) No. 2768/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 282) 39 (1975).

products processed from fruit and vegetables;²²⁰ and wine.²²¹ Furthermore, the EC Council has recently promulgated a general EEC secondary legislation, the "Advance Payment of Export Refunds in Respect of Agricultural Products."²²² In seeking to ensure effective implementation of the EEC's system of export subsidies for farm products, as established by the EC Council, the EC Commission has adopted a general EEC Regulation, "Laying Down Common Detailed Rules for the Application of the System of Export Refunds on Agricultural Products."²²³

Export subsidies or refunds for EEC farm products are granted to facilitate the sale of such products on the world's agricultural markets. Normally, EEC farm products are more expensive within the European Common Market because of the operation of the EEC's intervention system which provides price support for such products.²²⁴ The chances of EEC farm products being successfully sold on world agricultural markets at such exorbitant prices would be nil. Consequently, the prices of EEC farm products must be considerably reduced before they can be competitive on world markets.²²⁵ Understandably, the United States has claimed that "the EEC would not be able to compete successfully in an open [world] market."²²⁶ The EEC's export subsidies for farm products make up the difference between EEC and world prices for specific farm products to enable them to be sold more cheaply on world agricultural markets. Slightly more than half of the EEC's agricultural budget for the CAP is now devoted to maintaining its system of export subsidies or

²¹⁷ See Council Regulation (EEC) No. 2774/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 282) 68 (1975).

²¹⁸ See Council Regulation (EEC) No. 2779/75, Oct. 29, 1975, 18 O.J. EUR. COMM. (No. L 282) 90 (1975).

²¹⁹ See Council Regulation (EEC) No. 1431/76, June 21, 1976, 19 O.J. EUR. COMM. (No. L 166) 36 (1976).

²²⁰ See Council Regulation (EEC) No. 519/77, Mar. 14, 1977, 20 O.J. EUR. COMM. (No. L 73) 24 (1977).

²²¹ See Council Regulation (EEC) No. 345/79/, Feb. 5, 1979, 22 O.J. EUR. COMM. (No. L 54) 69 (1979).

²²² See Council Regulation (EEC) No. 565/80, Mar. 4, 1980, 23 O.J. EUR. COMM. (No. L 62) 5 (1980). See also Council Regulation (EEC) No. 2943/80, Nov. 13, 1980, 23 O.J. EUR. COMM. (No. L 305) 27 (1980).

²²³ 22 O.J. EUR. COMM. (No. L 317) 1 (1979).

²²⁴ The prices remain high despite the fact that the gap between EEC prices and world prices for farm products has narrowed since 1977. In 1981, for example, EEC butter prices were 53% higher than world market prices for butter, EEC beef prices were 52% higher than world market prices for beef, EEC wheat prices were 38% higher than world market prices for wheat, EEC prices for barley were 35% higher than world market prices for barley, EEC prices for sugar were higher than those prevailing on the world market by 33% and EEC prices for pork were higher than those on the world market by 24%. *Down on the Farm*, *supra* note 125, at 52.

²²⁵ *Throwing Money at Farmers*, *supra* note 192, at 68; A. PERRY & J. DINNAGE, EEC LAW 214 (1981).

²²⁶ *Throwing Money at Farmers*, *supra* note 192, at 68.

refunds.²²⁷

EEC export subsidies or refunds for farm products are paid to farmers by their national authorities. The level of the amounts are uniformly fixed by the EEC for all the Member States of the EEC.²²⁸ Individual Member States of the EEC are advanced sums by the EC Commission to cover expenditures.²²⁹ Farmers in individual Member States of the EEC are not allowed to be paid more than the EEC prescribed amount of export subsidy.²³⁰ Moreover, individual Member States of the EEC are not allowed to pay their farmers a bonus or other extra financial reward on top of the prescribed EEC limit of export subsidy or refund. The latter aspect has been underlined by the EC Court in various cases.²³¹ Individual Member States of the EEC are not allowed to overlook or ignore conditions prescribed by the EEC for the operation of the system of export subsidies or refunds.²³²

The events and factors which have prompted the EEC to have recourse to export subsidies or refunds in order to promote the sale of farm products need to be considered. Mainly, large surpluses of various farm products in the EEC account for the costly grants of EEC export subsidies or refunds, which are a means of offloading the products on world agricultural markets. The EEC's difficulty has been compounded by a fall in EEC food consumption, a development likely to continue in view of the decline in the population growth rate in the Member States of the EEC.²³³ Up to the early 1970's the EEC was "a net importer of just about every type of food,"²³⁴ but the situation has changed dramatically since then. Two years ago, one commentator observed that:

Now stimulated by high prices and open-ended intervention guarantees, EEC farm output has shot through the barn roof. In ridding itself, at a loss, of the surplus, the EEC has for the first time in its history become a net exporter of grain,²³⁵ has snatched three fifths of

²²⁷ *Cheap Dinners for Communists and Sheikhs*, THE ECONOMIST, July 10, 1982, at 45; *Down on the Farm*, *supra* note 125, at 52.

²²⁸ See, e.g., *supra* notes 206-21 and accompanying text.

²²⁹ See A. PARRY & J. DINNAGE, *supra* note 225, at 239-40.

²³⁰ *Pigs and Bacon Comm'n v. McCarron and Company, Ltd.*, 1979 E. Comm. Ct. J. Rep. 2161, 2189 (Preliminary Ruling) (interpreting art. 15(2) of EEC Regulation 2759/75).

²³¹ See *Kampffmeyer v. Einfuhr-und Vorratsstelle Getreide*, 1972 E. Comm. Ct. J. Rep. 213, 11 Comm. Mkt. L.R. 711; *Pigs and Bacon Commission v. McCarren*, 1979 E. Comm. Ct. J. Rep. 2161, 26 Comm. Mkt. L.R. 389. For a consideration of the *Kampffmeyer* case, see Bentil, *Legal Aspects of EEC Agriculture*, *supra* note 134, at 672.

²³² See *Ludwig Wunsche & Co. v. Bundesanstalt fur Landwirtschaftliche Markordnung*, 1982 E. Comm. Ct. J. Rep. 2319; *Hauptzollamt Hamburg-Jonas v. Ludwig Wunsche & Co.*, 1982 E. Comm. Ct. J. R. 2493.

²³³ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7.

²³⁴ *Free Trade for Farmers*, *supra* note 17, at 18.

²³⁵ In 1981, for the first time, the EEC exported more than 20 million tons of cereals, an

the world export market in butter and dried milk, has converted itself from the world's largest importer of poultry into the world's largest exporter, and emerged as the second largest exporter of beef behind only Australia."²³⁶

In effect, the EEC has made substantial inroads into various world agricultural markets at the expense of non-EEC countries which had previously been traditional suppliers to those markets. Yet, in economic terms, the EEC is not enjoying a comparative advantage in the output of the farm products involved.²³⁷ Not only does the EEC itself experience a great deal of financial loss,²³⁸ but non-EEC countries, which are in a position to produce the same or similar farm products more efficiently and cheaply, are suffering considerable socioeconomic losses. Even the Third World countries are not immune from the effects of the EEC's system of export subsidies or refunds for farm products. Developing countries stand to lose from the EEC's system of export subsidies or refunds since it deprives tropical farm products of potential world markets and "helps keep poor countries poor."²³⁹ Some of the trading competitors of the EEC, such as the United States, Australia, Brazil and Argentina, have objected to the establishment and operation of the EEC's system of export subsidies for farm products.

III. SOME OF THE FORMAL COMPLAINTS AGAINST THE OPERATION OF THE EXTERNAL ASPECTS OF THE EEC'S CAP WITHIN THE LEGAL FRAMEWORK OF THE GATT

Complaints about some of the EEC's international trading malpractices regarding farm products have, from time to time, been brought to the attention of the GATT, although few of them have been satisfactorily resolved. Consequently, it is necessary to outline some of the essential features of the dispute settlement procedures within the legal framework of the GATT, before examining some of the cases to be resolved under the GATT. The secretariat of the GATT has recently observed:

It is GATT's role in dispute settlement which attracts most public attention. The fact that the number of disputes brought before the GATT in 1980 was the highest for many years is a clear reflection of present economic difficulties, and of the resulting pressures on govern-

increase as compared with its 17 million tons of cereal imports. *Down on the Farm*, *supra* note 125, at 52.

²³⁶ *Europe's Farmyard Follies*, *supra* note 126, at 16.

²³⁷ *Free Trade for Farmers*, *supra* note 17, at 18.

²³⁸ EEC taxpayers have been subsidizing sales of surpluses of some farm products to the Soviet Union, various Arab countries, and the People's Republic of China. See *Cheap Dinners for Communists and Sheikhs*, *supra* note 227, at 45; *The EEC Plays its China Card*, THE ECONOMIST, February 26, 1983, at 38.

²³⁹ *Europe's Farmyard Follies*, *supra* note 126, at 16; *Down on the Farm*, *supra* note 125, at 52.

ments either to restrict competition from imports or to assist exports by subsidies or other means. The disputes brought to GATT for settlement are evidence that the international trading system is under stress. But they are also evidence that governments are continuing to put their faith in the GATT rules as a basis for overcoming trading problems.²⁴⁰

Providing mechanisms for discussion and dispute settlement between its member countries or governments on matters of international trade is one of the most important tasks of the GATT.²⁴¹ Most disputes between individual GATT Contracting Parties are settled directly between them on the basis of GATT rules which provide for consultation²⁴² and dispute settlement²⁴³ procedures. In this regard, individual GATT Contracting Parties need not bring the disputes before the GATT itself. However, when bilateral discussions between individual GATT Contracting Parties fail to produce a settlement, recourse is had to the GATT Council's procedure of establishing panels of independent experts²⁴⁴ that examine such differences or disputes and report their conclusions to the GATT Council.

One of the "framework" agreements reached in the Tokyo Round of multilateral trade negotiations was an "Understanding on Notification, Consultation, Dispute Settlement and Surveillance in GATT."²⁴⁵ The agreement was to clarify and strengthen the existing GATT rules on discussion and dispute settlement, especially regarding the use of individual panels of experts.²⁴⁶ Also, for example, the Code on Subsidies and Countervailing Duties, adopted at the Tokyo Round multilateral trade negotiations, contains specific provisions on procedures for dispute

²⁴⁰ GATT ACTIVITIES IN 1980, *supra* note 66, at 6.

²⁴¹ GATT ACTIVITIES IN 1982, at 53 (1983).

²⁴² GATT, *supra* note 1, at A64, T.I.A.S. No. 1700 at 60, 55 U.N.T.S. at 266 (art. XXII).

²⁴³ *Id.* at A64, T.I.A.S. No. 1700 at 60, 55 U.N.T.S. at 266 (art. XXIII).

²⁴⁴ Usually, a panel of experts consists of three members appointed in their personal capacities from GATT contracting countries and who have no direct interest in the trade dispute to be investigated. For a consideration of the vicissitudes gone through by the panel of experts system, see R. HUDEC, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES 7 (1978); K. KOCK, INTERNATIONAL TRADE POLICY AND THE GATT 1947-1967, at 93 (1969); Finlayson & Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 INT'L ORG. 561, 589 (1981).

²⁴⁵ GATT ACTIVITIES IN 1982, *supra* note 241, at 53.

²⁴⁶ *Id.* When the Ministers of GATT member countries met in 1982, they agreed: [T]hat the understanding on Notification, Consultation, Surveillance and Dispute Settlement negotiated during the Tokyo Round provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end.

settlement.²⁴⁷ The newly established GATT Committee on Subsidies and Countervailing Measures²⁴⁸ is responsible for ensuring proper settlement of disputes by means of consultation and conciliation and by establishing individual panels of experts to investigate and report on them.²⁴⁹

Some of the formal complaints against the operation of the EEC's CAP have involved charges of trade discrimination aimed at particular GATT Contracting Parties, as well as charges of the illegal subsidization of the production of processed agricultural products. However, most of the formal complaints have involved charges of illegal grants of export subsidies or refunds for certain farm products. For example, of the eleven meetings of the GATT Committee on Subsidies and Countervailing Measures held in 1982, seven were devoted to applying the dispute settlement procedures of the GATT Code on Subsidies and Countervailing Duties of 1980.²⁵⁰

In accordance with article 12 of the Code, the Committee on Subsidies and Countervailing Measures was notified of requests by the United States to the EEC for consultations²⁵¹ regarding EEC subsidies on, for example, the export of pasta,²⁵² poultry and poultry parts,²⁵³ and sugar. Following the consultations, the conciliation procedure provided for by article 17 of the Code was set in motion regarding the United States' complaints against alleged EEC export subsidies on pasta and sugar.²⁵⁴ At the same time, the United States asked for a utilization of the conciliation procedure regarding its complaint against the EEC's subsidies for the export of wheat flour.²⁵⁵

²⁴⁷ Mostly the provisions of articles 12, 13, 17, and 18. GATT, BISD 71-77 (26th Supp. 1978-79).

²⁴⁸ The Committee on Subsidies and Countervailing Duties was organized in 1980 pursuant to article 16 of the Code on Subsidies and Countervailing Duties. Code on Subsidies and Countervailing Duties, *supra* note 92, at art. 16. Between December, 1981 and July, 1982, the Committee held seven meetings under the dispute and settlement procedures. GATT, BISD 42 (29th Supp. 1981-82).

²⁴⁹ Code on Subsidies and Countervailing Duties, *supra* note 92, at art. 18.

²⁵⁰ GATT ACTIVITIES IN 1982, *supra* note 241, at 53.

²⁵¹ *Id.*

²⁵² Pasta products are manufactured from durum wheat in the form of fresh dough, such as ravioli.

²⁵³ The United States complaint against the EEC's subsidies or refunds regarding poultry was later suspended, apparently because the United States discovered that it was not the EEC, but Brazil, which was keeping the United States out of the "lucrative" poultry market in the Middle East. As a result of previous market sharing arrangements between the EEC and the United States, the community has dominated poultry exports to the Middle East. The EEC market share has remained stable at about 53% in recent years, that of the United States at about 6%. Brazil, however, has come from behind and in six years has raised its market share from virtually nothing to 35%. See, e.g., *The Next Transatlantic War*, *supra* note 129, at 33-34.

²⁵⁴ Report of the Committee on Subsidies and Countervailing Measures, GATT, BISD 42, 46 (29th Supp. 1981-82).

²⁵⁵ *Id.*

Some of the formal complaints against the operation of the EEC's CAP have proceeded to the stage of investigation by individual panels of experts, established within the dispute settlement framework of the GATT. Although an Australian complaint against EEC refunds for exports of EEC sugar reached the stage of investigation by a GATT panel of experts and the conclusions of the panel, which were mostly in favor of Australia, were submitted to the GATT Council,²⁵⁶ it will not be examined here. This complaint will not be examined because it was lodged with the GATT Council and investigated by the GATT panel of experts before²⁵⁷ the conclusion of the Tokyo Round multilateral trade negotiations. Only at the conclusion of the Tokyo Round was the Code on Subsidies and Countervailing Duties, with its specific provisions on dispute settlement, adopted. Of the five complaints against the EEC's CAP considered here: one related to a charge of discrimination involving tariff preferences allegedly granted by the EEC to some non-EEC countries, another related to a charge of illegal subsidization of the production of certain processed farm products, and the other three involved alleged illegal grants of export subsidies for particular farm products. Each of the five complaints will be considered separately.

A. United States Complaint Against EEC Subsidies For Exports on Wheat Flour

The United States appears to have become particularly upset about EEC export subsidies for wheat flour in 1981. In particular, the United States felt that wheat flour should not qualify for export subsidies, in view of the fact that it was not, strictly speaking, a primary product.²⁵⁸ The United States could not overlook the fact that EEC exports of wheat flour had helped the EEC to double its wheat exports to 14 million tons between 1970 and 1980, even though U.S. wheat exports increased two and one half times during the same period.²⁵⁹ Consequently, the United States requested consultations with the EEC on the issue, but the consultations appeared to be of no avail. Subsequently, the GATT Committee on Subsidies and Countervailing Measures utilized the conciliation procedure envisaged under article 17 of the GATT Code on Subsidies and Countervailing Duties.²⁶⁰ This proved equally unsuccessful, with the re-

²⁵⁶ Report of the Panel of the GATT, GATT, BISD 290 (26th Supp. 1978-79); *Australia v. European Communities*, 28 Comm. Mkt. L.R. 238 (1980). For a comment on some of the economic aspects of the case, see Note, *GATT, EEC Sugar Export Refunds Dispute*, 15 J. WORLD TRADE L. 534 (1981).

²⁵⁷ The Australian complaint was first discussed by the Council of the GATT on October 18, 1978, and a panel of experts was established on November 6, 1978, to investigate and report on it.

²⁵⁸ *The Next Transatlantic War*, *supra* note 129, at 33.

²⁵⁹ From 16.5 million tons to 41.9 million. See *id.*

²⁶⁰ GATT, BISD, *supra* note 254, at 46.

sult that the Committee established a panel of experts to examine the dispute²⁶¹ and report its findings to the Committee.²⁶²

On the face of it, the EEC may have acted in breach of the rules of the GATT. Yet, in 1984 alone, some \$600 million appears to have been spent by the U.S. government to finance price cutting wars abroad regarding export of cereals.²⁶³ One may ask whether the GATT panel of experts, set up to investigate the complaint of the United States, would be likely to reach a decision entirely unfavorable to the EEC. That panel of experts would be hard put to ignore all the surrounding economic factors and circumstances.

B. United States Complaint Against EEC Subsidies for Production of Canned Peaches, Canned Pears and Raisins

The United States formed the opinion that the EEC's grant of production subsidies for canned peaches, canned pears and raisins nullified and impaired tariff bindings obtained from the EEC by the United States on the products involved and on fruit cocktail. Therefore, in February, 1982 the United States had consultations with the EEC over the complaint.²⁶⁴ During the consultations, the United States made it clear to the EEC that subsidies for the products were causing or threatening to cause disruption of United States exports of these products to the Member States of the EEC. The consultations appeared to come to no satisfactory conclusion.

At the end of March, 1982, the United States requested the GATT Council to set up a panel of experts to examine the complaint.²⁶⁵ Although the EEC regretted that the consultations had been brief, it did not oppose the U.S. request. However, the EEC requested that the drafting of the terms of reference for the panel be delayed until further consultations had taken place, especially in regard to its production aids on dried grapes. The EEC's request was granted and consultations took place in late April, 1982, but no satisfactory solution was reached.²⁶⁶ Both parties subsequently agreed to include their differences on dried grapes in the terms of reference for the projected panel of experts, and the GATT Council agreed to set up the panel of experts.

In lodging its complaint against the EEC, it is significant that the United States had chosen to invoke specific provisions of the GATT,²⁶⁷

²⁶¹ *Id.*

²⁶² This was done pursuant to the provisions of article 18 of the new GATT code on Subsidies and Countervailing Duties.

²⁶³ *Bring Free Trade to the Farm*, *supra* note 4, at 73.

²⁶⁴ GATT ACTIVITIES IN 1982, *supra* note 241, at 54.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Namely, those of article XXIII(1) on Nullification and Impairment, by which individual

rather than those of the new GATT Code on Subsidies and Countervailing Duties. Although the U.S. complaint fell into the area of agricultural trade, the United States appeared to treat it as one falling into the category of trade in manufactured goods. Moreover, the fact that the United States invoked the nullification and impairment provisions of the GATT suggests that the United States was prepared to take retaliatory trade measures against the EEC. It is also noteworthy that the United States requested the GATT Council, rather than the new GATT Committee on Subsidies and Countervailing Measures, to set up a panel of experts to examine and report on the complaint against the EEC.

Regarding the substance of the complaint, it is important not to confuse it with that of a complaint against the granting of EEC export subsidies for farm products. In the instant case, the substance of the complaint related to production aids for the products involved. In effect, at issue was an alleged nullification or impairment of tariff benefits conceded by the EEC to the United States. Furthermore, it is important that the United States did not argue that the alleged conduct of the EEC had the effect of allowing the EEC to gain access to non-EEC markets in the products concerned. Rather, the United States contended that the EEC subsidization measure threatened to cause disruption of U.S. exports of the products involved to the Member States of the EEC. Consequently, it is doubtful that a flagrant violation of the appropriate rules of the GATT could result. But then, as some commentators have observed of the dispute settlement process of the GATT: "[M]atters are generally settled with only limited reference to existing rules."²⁶⁸

Perhaps the panel of experts, set up by the GATT Council to examine and report on the U.S. complaint, may adopt a more practical and businesslike approach. After all, as one commentator has aptly observed: "Panels, in short, had become a way of saying that the Contracting Parties wanted to put some teeth into a particular rule of requirement."²⁶⁹

GATT Contracting Parties may have recourse to retaliatory trade measures should they find that some particular commercial malpractices of other individual GATT Contracting Parties either undermine or threaten to undermine substantially rights or benefits hitherto enjoyed under rules and procedures of the GATT. The retaliatory trade measures may be taken only after consultation and conciliation between the parties involved has taken place. Moreover, the Council of the GATT is meant to be informed of any such situation before retaliatory trade measures may be taken. GATT, *supra* note 1, at A64, T.I.A.S. No. 1700 at 60, 55 U.N.T.S. at 266.

²⁶⁸ See Finlayson & Zacher, *supra* note 244, at 589.

²⁶⁹ R. HUDEC, *supra* note 244, at 11. See also K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 351-52 (1970); Jackson, *The Jurisprudence of International Trade*, 72 AM. J. INT'L L. 747, 757 (1978).

C. *Complaint by a Group of Ten GATT Sugar-Producing Countries Against the Operation of the EEC's Sugar Regime*

The importance of sugar exports to the income of a number of Third World countries and of Australia cannot be underestimated. Although these countries produce mostly cane sugar, the production of beet sugar by the EEC has become a serious threat to their access to the international free market trade in cane sugar. Recent expansion of beet sugar production in the EEC has exacerbated the problem. Not surprisingly, ten sugar producing GATT member countries, Argentina, Australia, Brazil, Colombia, Cuba, the Dominican Republic, India, Nicaragua, Peru, and the Philippines, had recourse in April, 1982 to the dispute settlement procedures of the GATT to address the difficulties they faced because of the EEC's sugar regime.²⁷⁰ Although the complaint did not actually get to the stage of examination and report by a GATT panel of experts, it is of such significance as to warrant consideration here.

The joint complaint of the ten sugar producing countries draws attention to various essential features of the EEC's sugar regime, the operation of which may have had an adverse impact on the interests of the sugar producing countries involved in the international sugar trade. The group invoked the nullification and impairment provisions of the GATT²⁷¹ rather than relying on, for example, the relevant provisions of the new GATT Code on Subsidies and Countervailing Duties.²⁷² The joint complaint stressed how, traditionally, the national sugar industries of the countries involved had accounted for the bulk of world sugar exports.²⁷³

Three main issues, namely, the EEC's internal price support system regarding sugar, the creation of sugar surplus in the EEC, and the application of the EEC's system of export subsidies to sugar, were raised in the complaint.²⁷⁴ The EEC's maintenance of its internal price support system for sugar was blamed for stimulating substantial and continued growth in EEC sugar production, especially since 1976.²⁷⁵ This occurred because the EEC's internal support prices for sugar far exceeded world market prices for sugar. Unless the consumption of sugar in the EEC increased to match the growth in EEC sugar production, the EEC was bound to have recourse to the world sugar market to dispose of its sugar surplus. As the complainants pointed out, domestic EEC consumption

²⁷⁰ GATT ACTIVITIES IN 1982, *supra* note 241, at 56.

²⁷¹ See, e.g., GATT, *supra* note 1, at A64, T.I.A.S. No. 1700 at 60, 55 U.N.T.S. at 266 (art. XXIII).

²⁷² Code on Subsidies and Countervailing Duties, *supra* note 92.

²⁷³ GATT ACTIVITIES IN 1982, *supra* note 241, at 57.

²⁷⁴ *Id.* at 56.

²⁷⁵ *Id.* As a consequence, EEC sugar production reached about 50 percent higher in the period 1981-82 than its average production of sugar before 1977.

of sugar had become stagnant and was even declining.²⁷⁶ Consequently, the EEC's increased production of sugar led to "a corresponding growth in its annual exportable surplus of sugar."²⁷⁷ The EEC still could not successfully sell its surplus sugar on the world market, unless the internal EEC prices for its sugar were considerably reduced vis-à-vis sales of EEC sugar on the world market. To address the problem, the EEC was driven by commercial logic to have recourse to granting export subsidies for sugar from the European Common Market area that was destined for the world market. As the complainants pointed out: "[T]he EEC's growing exportable sugar surplus was disposed of with the continuing assistance of whatever level of subsidy was required to sell the product on the world market."²⁷⁸ This enabled EEC sugar producers to greatly expand their share of world trade in sugar.²⁷⁹

Against the background of the foregoing factors, the complainants concluded that the EEC's sugar regime had "depressed world sugar prices and exacerbated fluctuations in world sugar trade and [was] continuing to exercise these harmful effects."²⁸⁰ Furthermore, the complainants observed of the situation that: "It is clear that their common sugar regime and its application constitute a permanent source of uncertainty in world sugar markets, and act to reduce market opportunities available to, and the returns received by, the industries of other sugar exporting countries."²⁸¹

In their joint representation to the EEC the complainants asked the EEC to give "sympathetic consideration" to them and "to consult promptly with a view to reaching a satisfactory and quick adjustment of the matter."²⁸² While the EEC disliked the idea of acceding to a joint action, it grudgingly informed the complainants that it would enter into a set of ten bilateral consultations which would be held jointly.²⁸³ The consultations failed to bring about a satisfactory adjustment of the matter, and the complainants "reserved their rights under the General Agreement."²⁸⁴ In other words, they did not rule out the possibility or the probability of taking retaliatory trade measures against the EEC in accordance with the applicable provisions of the GATT.²⁸⁵ The EEC, however, only expressed hope that the Director-General of the GATT

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 56-57.

²⁷⁹ *Id.* at 57.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 57-58.

²⁸³ *Id.* at 58.

²⁸⁴ *Id.*

²⁸⁵ See, e.g., GATT, *supra* note 1, at A64, T.I.A.S. No. 1700 at 60, 55 U.N.T.S. at 266 (art. XXIII).

would be able to hold further consultations with all the interested parties for the purpose of overcoming the problem.²⁸⁶ The GATT Council took note of the foregoing statements of the two sides.

Arguably, the complainants did not request the GATT Council to establish a panel of experts to examine and report on the matter, feeling that a subsequent finding against the EEC would be unlikely to result in any concrete corrective or remedial measures on the part of the EEC. After all, the findings and the report of the panel of experts, appointed by the GATT Council on a previous Australian complaint against the granting of EEC sugar export subsidies,²⁸⁷ which mostly went against the EEC, appeared not to have changed the attitude of the EEC in that context.

D. United States Complaint Against EEC Subsidies on the Export of Pasta Products

Taking the view that subsidies granted by the EEC for exports of pasta products constituted a breach of applicable rules of the GATT²⁸⁸ and the applicable provisions of the new GATT Code on Subsidies and Countervailing Duties,²⁸⁹ the United States set in motion the dispute settlement process of the GATT. As already noted, the United States notified the GATT Committee on Subsidies and Countervailing Measures of its request for consultations with the EEC on the matter.²⁹⁰ When this failed to resolve the problem, that Committee itself set in motion the conciliation mechanism envisaged by the GATT Code on Subsidies and Countervailing Duties pursuant to article 17.²⁹¹ This measure also failed to resolve the dispute.²⁹² Consequently, on June 14, 1982 the GATT Committee established a panel of experts to examine and report on the dispute.²⁹³

Like the complaint of the United States against an alleged illegal grant of subsidies for EEC wheat flour,²⁹⁴ the instant United States complaint is not clear-cut. There is more to it than meets the eye, and the findings and report of the panel of experts may not be entirely in favor of the United States. The determination of the nature and extent of the alleged EEC export subsidy may not be easy because pasta products are

²⁸⁶ GATT ACTIVITIES IN 1982, *supra* note 241, at 58.

²⁸⁷ See *supra* note 256 and accompanying text.

²⁸⁸ The applicable rules are primarily those found under articles VI, XVI, and XXIII. GATT, *supra* note 1, at A23, A51, A64, T.I.A.S. No. 1700 at 19, 47, 60, 55 U.N.T.S. at 212, 250, 266.

²⁸⁹ GATT, BISD 68 (26th Supp. 1978-79). See especially those provisions of article 9.

²⁹⁰ GATT, BISD 46 (29th Supp. 1981-82).

²⁹¹ GATT, BISD 75 (26th Supp. 1978-79).

²⁹² GATT, BISD, *supra* note 254, at 46.

²⁹³ *Id.* at 47.

²⁹⁴ *Id.* at 46.

processed from durum wheat. A fortiori, the extent to which the alleged EEC export subsidy may have helped the overall EEC exports of wheat on world markets is not an easy determination.

E. United States Complaint Against EEC Tariff Preferences For Certain Citrus Products from Mediterranean Countries

The idea of establishing a customs union or a free trade area or association between individual member countries of the GATT is not discounted by the rules of the GATT. Rather, the rules of the GATT regulate individual customs unions or free trade areas to prevent their operation from acting as a barrier to the liberalization of international trade.²⁹⁵ The essential characteristics of a customs union have already been outlined above.²⁹⁶ A free trade area or association is established and operated by two or more countries with a view to ensuring that all tariff barriers between such countries are removed. However, for trade with nonparticipating countries, the participating countries are entitled to establish their own individual tariff barriers vis-à-vis their own trading activities. Individual member countries of a free trade area or association thus undertake to accord to each other tariff preferential treatment which they are not prepared to accord to nonmember countries.

In view of this, the rules of the GATT allow GATT Contracting Parties to make recommendations to parties to free trade agreements²⁹⁷ as to particularly objectionable features of such agreements. Agreements establishing free trade areas or associations between the EEC and various non-EEC countries, especially with some Mediterranean countries, have become public knowledge. Yet it appears that member countries of the GATT did not object to such agreements. Consequently, the EEC considered the tariff arrangements it had concluded with the Mediterranean countries to be consistent with the applicable rules of the GATT.²⁹⁸

Nevertheless, in June, 1982 the United States strongly objected to EEC tariff preferences granted to imports of citrus products from certain Mediterranean countries. The United States notified the GATT of its belief that the grant of such tariff preferences was inconsistent with the main nondiscrimination rule of the GATT, namely, that which is established in article 1.²⁹⁹ The United States felt that the tariff preferences had an adverse effect on U.S. citrus exports to the Member States of the EEC.³⁰⁰ Consequently, the United States consulted with the EEC on the

²⁹⁵ GATT, *supra* note 1, at A66, T.I.A.S. No. 1700 at 62, 55 U.N.T.S. at 266 (art. XXIV).

²⁹⁶ See *supra* text accompanying notes 150-54.

²⁹⁷ GATT, *supra* note 1, at A66, T.I.A.S. No. 1700 at 62, 55 U.N.T.S. at 268 (art. XXIV).

²⁹⁸ GATT ACTIVITIES IN 1982, *supra* note 241, at 55.

²⁹⁹ GATT, *supra* note 1, at A12, T.I.A.S. No. 1700 at 62, 55 U.N.T.S. at 196.

³⁰⁰ GATT ACTIVITIES IN 1982, *supra* note 241, at 54.

matter, but apparently failed to resolve the problem. The United States then requested the GATT Council to set up a panel of experts to examine the dispute.³⁰¹

From June to November, 1982 the GATT Council directed attention to two main issues arising out of the dispute. First, the Council considered whether, as the United States insisted, any member country of the GATT was entitled to request the establishment of a panel of experts to examine a dispute under the rules of the GATT. The U.S. insistence on such a right was widely supported by other GATT Contracting Parties.³⁰² Secondly, the GATT Council considered whether the U.S. complaint "represented a challenge to the principle of special preferences enjoyed by [the Mediterranean] countries" concerned in the EEC market.³⁰³ This principle was also defended by a large number of GATT Contracting Parties.³⁰⁴

Although the Director-General of the GATT, at the request of a number of GATT Contracting Parties, met both sides of the dispute to explore the possibility of working out a practical solution to the problem, it was of little avail. The Director-General of the GATT concluded "that it appeared impossible to conciliate the outstanding differences between the two sides."³⁰⁵ Further discussion was undertaken in the GATT Council. During the course of the discussion some member countries of the GATT expressed preference for the establishment of a working party³⁰⁶ rather than of a panel of experts to examine the important issue of principle.³⁰⁷ In November, 1982 the Council agreed to establish a panel of experts to examine the complaint of the United States.³⁰⁸

Whether this panel of experts comes to any firm conclusions on the United States complaint, it is already quite evident that the EEC's system of tariff preferences in favor of imports of citrus products from various Mediterranean countries has the support of a large number of the member countries of the GATT. This seems to strengthen the moral, as well

³⁰¹ *Id.* at 55.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Under the dispute settlement provisions of the GATT, individual ad hoc working parties are set up, from time to time, to investigate and make recommendations regarding particular trade disputes between GATT Contracting Parties. A working party is usually composed of delegates from the GATT Contracting Parties actually involved in a trade dispute. Consequently, partisan political considerations tend to influence the deliberations of the members of a working party. One commentator has characterized individual GATT working parties as small groups designed for political exchange and negotiation. R. HUDEC, *supra* note 244, at 6.

³⁰⁷ GATT ACTIVITIES IN 1982, *supra* note 241, at 55.

³⁰⁸ *Id.*

as the legal, position of the EEC in the dispute. It is difficult to see how the appointed GATT panel of experts could fail to be influenced by this. Nor could it fail to take into account the rather difficult economic circumstances of the Mediterranean countries concerned. Arguably, in the instant case it would be difficult for the panel of experts to return a verdict in favor of the United States.

IV. GENERAL OVERVIEW

It would be erroneous and misleading to think that it is only the EEC whose particular activities in the agricultural sector have had an adverse impact on world trade in farm products. Various other governments of the industrialized nations of the western world have, by means of their unstinting financial and other support for the agricultural sectors of their economies, adversely impacted the liberalization of international trade in farm products. One commentator, on some of the government practices which have undermined the liberalization of world trade in agricultural products has observed: "The developed countries will have to take the lead in abolishing these abuses—they are both the biggest offenders and the biggest victims. The most protectionist are those industrial nations which are also big food exporters—not only the [EEC] and America, but also Australia and Canada."³⁰⁹ However, as a matter of degree, the operation of certain aspects of the EEC's CAP appears to be more to blame for the present plight of world trade in agricultural products.

No doubt, the current world economic situation has prompted governments of the industrialized market economies of the western world to become even less liberal in their attitudes toward international trade in agricultural products. The secretariat of the GATT has observed of the state of the world economy in 1980: "Protectionist pressures are high in many countries, and international trade disputes have been numerous."³¹⁰ Also, in its recent recommendations for radical reform of the EEC's CAP, the EC Commission stated: "On the world markets, where effective demand depends on the solvency of importers, which in its turn is dependent on the recovery of the world economy and credit availability, there is no improvement in sight."³¹¹

One would have thought that the various agreements reached at the Tokyo Round multilateral trade negotiations in 1979 could be effectively translated into action to ensure a meaningful liberalization of world trade in farm products. Yet this has hardly materialized, even though the EEC

³⁰⁹ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

³¹⁰ GATT ACTIVITIES IN 1980, *supra* note 66, at 5.

³¹¹ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7-8.

and the governments of the major trading nations of the western world have entered honestly into their international commitments in international trade in agricultural products. The various agreements reached at the Tokyo Round were meant to be applicable not only to international trade in industrial or manufactured goods but also to international trade in farm products.³¹² However, it still seems as though no binding legal commitments were made concerning the need to liberalize world trade in farm products. After all, the GATT Contracting Parties were recommended "further to develop active co-operation in the agricultural sector within an appropriate consultative framework, and to define this framework and its tasks as soon as possible."³¹³ Moreover, the Council of the GATT still recognizes that "there is an urgent need to find lasting solutions to the problems of trade in agricultural products."³¹⁴ At the same time, the major trading nations of the GATT seem indifferent or lukewarm towards doing something important about the problem: "[O]nly two years ago, when GATT met in full ministerial guise, the question of farm trade nearly broke up the meeting."³¹⁵

Nevertheless, one may ask whether the situation is so hopeless as to have left no chance for improvement. It would be a counsel of despair if it were thought that nothing could be done to improve the situation. Consequently, various suggestions for improving the situation will be examined here. It is important to examine such suggestions from the respective standpoints of the GATT and the EEC in order to fit them into the general layout of the study.

A. Steps Capable of Being Taken by the GATT to Promote Effective Liberalization of World Trade in Farm Products

The Kennedy Round of GATT multilateral trade negotiations, which sought to tackle the problem of the liberalization of world trade in agricultural products, dismally failed to yield any concrete and meaningful results.³¹⁶ Moreover, the Tokyo Round of GATT multilateral trade negotiations, which was deemed a great success for liberalizing world trade in general, can now be seen to have also failed to ensure a meaningful and effective liberalization of international trade in farm products. Consequently, one wonders whether recourse to such periodic marathon GATT multilateral trade negotiations are really appropriate or well-suited to address the issue of liberalization of international trade in agricultural products. An erstwhile leading authority on international eco-

³¹² See GATT ACTIVITIES IN 1978, *supra* note 97, at 43; GATT ACTIVITIES IN 1979, *supra* note 88, at 27.

³¹³ GATT ACTIVITIES IN 1978, *supra* note 97, at 45.

³¹⁴ Thirty-Eighth session at Ministerial level, GATT, BISD 9, 16 (29th Supp. 1981-82).

³¹⁵ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

³¹⁶ See *supra* notes 24-30 and accompanying text.

nomics felt that problems of trade in agricultural products were politically too different to be resolved by such periodic marathon GATT multilateral trade negotiations. Instead, he suggested that the solution for such a problem "is more amenable to continued negotiation within the normal consultative machinery of GATT than a formal bargaining of the Kennedy Round type."³¹⁷ A similar view has been, more recently, taken by another commentator.³¹⁸

Recourse to the more regular meetings of the GATT Council or of GATT ministerial sessions may be more appropriate or better suited to solving problems of world trade in agricultural products. There also appears to be a need to set up a permanent body charged with reviewing the operation and effects of agreed measures regarding world trade in farm products, and making recommendations, from time to time, for particular problems in the same area. In this regard, the recent decision of the GATT Contracting Parties³¹⁹ to establish a Committee on Trade in Agriculture, open to all GATT Contracting Parties, to carry out the task just outlined,³²⁰ is of some interest.

At the regular meetings of the GATT Council or at the regular GATT ministerial sessions, more crucial issues may be accorded priority, while incidental ones may be addressed at other appropriate times. Priority may be accorded to subjecting international trade in farm products to virtually the same regulatory rules and scrutiny of the GATT, as is international trade in industrial or manufactured goods. This may be an idealistic pursuit, since attempts to do this during the Kennedy and the Tokyo Rounds of multilateral trade negotiations, proved fruitless. Yet the theoretical and the practical significance of the idea, as a means of ensuring a meaningful and effective regulation of world trade in agricultural products, cannot be denied. At a meeting of the GATT Council in November, 1984 there was agreement to discuss ways of subjecting world trade in farm products to the kind of GATT rules and mechanisms applicable to international trade in manufactured goods.³²¹ This was immediately described as "the first serious attempt to get to grips with the agricultural trade problem."³²² Alongside with according priority to the issue just considered, regular meetings of the GATT Council or of GATT ministerial sessions would need to address the following crucial issues, namely: market access and supplies regarding farm products; actual or potential undue recourse to exceptions or derogations permitted

³¹⁷ *The Kennedy Round*, *supra* note 18, at 478.

³¹⁸ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

³¹⁹ The contracting parties constitute the main policy and decision-making body of the GATT. At times, it is interchangeable with the Council of the GATT.

³²⁰ See GATT, BISD, *supra* note 314, at 17.

³²¹ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

³²² *Id.*

under the appropriate rules of the GATT; protection of the special interests of the Third World countries in international trade in farm products; and means of ensuring a proper and effective observance of established rules and mechanisms of the GATT. Each of the foregoing will be examined separately.

There is no denying that the prevention or restriction of access to imported farm products poses a fundamental problem for the idea of the liberalization of international trade. Consequently, serious efforts must be made to remove import tariffs and quota, in particular. This may not be easy, considering that various import tariffs and quotas on agricultural products appear to be deeply entrenched in some individual governmental systems.³²³

However, it is significant that a recent decision of the GATT Contracting Parties recommended an examination of tariff and nontariff measures affecting market access and supplies. The examination would be done with a view to achieving greater liberalization in international trade in farm products, based on overall reciprocity and mutual advantage under the rules of the GATT.³²⁴ Furthermore, it was recommended that prompt attention be given to the problem of escalated tariffs on farm products with increased processing so as to ensure effective action towards eliminating or reducing such escalation, especially where it would inhibit international trade.³²⁵ With regards to the latter the efforts of the GATT Customs Co-operation Council to evolve a common system for classifying products for tariff and statistical purposes were of the utmost importance. In particular, it was agreed that wide acceptance of such a common system would facilitate international trade in agricultural products.³²⁶

The problem of the adverse effects of export subsidies or other forms of export assistance regarding farm products has become thorny. As one commentator has aptly noted:

Export subsidies do damage both to the countries that supply them and to countries that produce competing products. They can decimate farming in poor countries, leaving them unable to produce food which they can no longer afford to import. Nearly 60 percent of farm exports come from industrial countries.³²⁷

The need for bringing under effective control government systems of export subsidies for farm products is apparent. It is thought that the "GATT may find it easier to tackle export subsidies than to start remov-

³²³ *Id.*

³²⁴ GATT, BISD, *supra* note 314, at 16.

³²⁵ *Id.* at 18.

³²⁶ *Id.*

³²⁷ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

ing import tariffs and quotas"³²⁸ on farm products.

Either because of the peculiar nature and application of export subsidies for farm products, or the logistic difficulties involved in identifying and assessing the extent of such subsidies, the GATT is not particularly well prepared to address the problem. The most recent decision of the GATT Contracting Parties on the issue merely recommends that an examination be conducted of the problem by assessing the effectiveness of the existing GATT rules applicable to it in light of actual experience.³²⁹ Although other forms of export assistance for farm products were to be included in the examination, just the avoidance of "subsidization seriously prejudicial to the trade or interests of [other GATT] contracting parties,"³³⁰ is an essential objective of the examination. Yet, it would not be easy to make a determination that a given export subsidy or other form of export assistance for farm products is seriously prejudicial to the trade or interests of individual GATT contracting governments. Unless an effective monitoring system is established, in tandem with the existing GATT system of notification of subsidies, it is difficult to see how the problem could be seriously and meaningfully resolved.

Actual or potential recourse, unduly taken by individual GATT contracting governments, to derogations or exceptions permitted by the rule of the GATT certainly frustrates the liberalization of international trade in farm products.³³¹ Individual GATT contracting governments have been known to hide behind such rules of derogation or exception to the GATT when engaging in activities restrictive of the free flow of agricultural products in world trade. To ensure that such abuses do not occur, objective criteria for both assessing the reasons for recourse to the derogations and for surveillance over individual governmental reliance on the measures, need to be established. Yet, the recent decision of the GATT Contracting Parties on the issue attempts to do no more than recommend an examination of "trade measures affecting agriculture maintained under exceptions or derogations without prejudice to the rights of contracting parties under the General Agreement."³³²

The need for protecting the special interest of the Third World countries in world trade in farm products generally and in tropical farm products in particular, has been continually acknowledged by the GATT since the late 1960's.³³³ Yet, individual major GATT trading nations

³²⁸ *Id.*

³²⁹ GATT, BISD, *supra* note 314, at 16.

³³⁰ *Id.*

³³¹ GATT ACTIVITIES IN 1982, *supra* note 241, at 36-37.

³³² GATT, BISD, *supra* note 314, at 16.

³³³ It was in 1969 that part IV of the GATT relating to Trade and Development was added to the original provisions of the GATT, and a separate committee on Trade and Development was established for ensuring its implementation.

have, occasionally, gone back on their commitments that would allow some farm products from the Third World countries access to their agricultural markets.³³⁴ What is wanting is the willingness of the major GATT trading nations to make room for some important economic sacrifices in favor of the Third World countries. The most recent decision of the GATT Contracting Parties called for an examination of how to improve the agricultural trade of the Third World countries, considering their special needs and the existing GATT rules providing for differential and more favorable treatment for them.³³⁵ Regarding, in particular, their interests in international trade in tropical farm products, the GATT Contracting Parties decided to carry out consultations and negotiations aimed at further liberalization of international trade in those products.³³⁶ The work program pursued by the Committee on Trade and Development was to provide a basis for the task assumed by the GATT Contracting Parties.³³⁷

In order for the removal of the tariffs and quotas to be meaningful and effective, the GATT must know whether they are in fact removed by the individual GATT contracting governments. Equally, to ensure that export subsidies or other forms of export assistance for farm products are not applied so as to seriously prejudice the trading interests of individual GATT contracting governments, some form of surveillance over the practice is essential. The same can be said of the practice of individual GATT contracting governments in having undue recourse to derogations or exceptions permitted by the appropriate rules of the GATT. A worthwhile GATT system of surveillance is also called for vis-à-vis the protection of the international trading interests of the Third World countries.

Hitherto, the GATT has only sought to establish a system of notification of trading activities or practices of its individual member governments in specific areas. Now, the most recent decision of the GATT Contracting Parties has recommended the introduction of an "improved and unified system of notifications" in the general area of world trade in farm products, "so as to ensure full transparency."³³⁸ Nevertheless, effective monitoring of whether all necessary notifications have been made to the GATT, in such context, has been overlooked or taken for granted.

³³⁴ See Examination of Protective Measures Affecting Impact from Developing Countries, Nov. 28, 1979, GATT, BISD 219 (26th Supp. 1978-79); Report of the Committee on Trade and Development, Nov. 26, 1980, GATT, BISD 48 (27th Supp. 1979-80).

³³⁵ GATT, BISD, *supra* note 314, at 17.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

B. Measures Capable of Being Undertaken by the EEC to Render the Operation of the CAP Less Burdensome to Other GATT Members

The operation of the EEC's CAP has had adverse effects on world trade in farm products. Both the operation of the external features and the operation of the internal features of the CAP have had an adverse impact on international trade in farm products. The complaint brought by a group of ten GATT sugar producing countries against the EEC's sugar regime in April, 1982³³⁹ should provide some insight into this. There is some evidence of undue parochialism and a degree of selfishness in the EEC's attitude regarding the operation of the CAP. This attitude must change if international trade in agricultural products is to stand a fair chance of being liberalized. As one commentator has observed: "European farm ministers seldom look beyond their own farmers' troubles, demonstrations and votes. They now need to do so."³⁴⁰ The need for reforming the CAP and its operation to ensure that it only has a negligible adverse impact on international trade in agricultural products could not be more apparent.

Three aspects of the operation of the EEC's CAP can be characterized as the ones most in need of reform in order to facilitate the liberalization of world trade in farm products. These are: the unnecessary creation of surpluses of farm products in the EEC, the imposition of burdensome tariffs and quotas on imports of non-EEC agricultural products into the European Common Market, and the costly granting of export subsidies for EEC farm products. Each of these aspects of the CAP and how it can be reformed is considered separately.

The EEC has progressed from being a net importer of farm products to becoming a net exporter of farm products.³⁴¹ The EEC has been able to increase its output of farm products, but in doing so, it has created large surpluses of them.³⁴² If these farm surpluses were kept or disposed of entirely within the European Common Market, they would have little or no adverse impact on world trade in agricultural products. However, the EEC has offloaded its surplus of farm products cheaply onto the world agricultural markets. This has had an adverse effect on world trade in farm products. Worse still, by its system of granting unlimited price guarantees for EEC farm products in structural surplus, the EEC has irresponsibly encouraged the creation of more of such surpluses. The

³³⁹ See *supra* notes 270-87 and accompanying text.

³⁴⁰ *Europe's Farmyard Follies*, *supra* note 126, at 16.

³⁴¹ See, e.g., *Id.*; *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 7.

³⁴² See, e.g., *Agricultural Prices and Related Measures for 1984/85: Commission Proposals*, *supra* note 128, at 7-8; *Europe's Farmyard Follies*, *supra* note 126, at 16.

need, therefore, for operating the EEC's CAP so as to obviate or minimize this problem has become evident.

Fortunately, the EEC has realized the seriousness of the problem and has begun to address it. For example, in its report on the May, 1980 mandate, the EC Commission concluded: "[I]t is neither economically sensible nor financially possible to give producers a full guarantee for products in structural surplus."³⁴³ Later, in its *Guidelines for European Agriculture of 1981*,³⁴⁴ the EC Commission called for a restriction of the price guarantee for a given volume of farm products, beyond which some of the cost must be borne by the producers. This became known as the "guidance threshold" mechanism, or system. Since then, the EC Council has approved³⁴⁵ the EC Commission's proposals to establish guarantee thresholds for various farm products,³⁴⁶ in addition to those being already operated.³⁴⁷ No longer can price guarantees for various EEC farm products be called open-ended. Beyond the thresholds, EEC agricultural producers can no longer expect the EEC to provide the same price guarantees that it has provided in the past for their surplus output.

This is a policy change regarding the operation of the EEC's CAP. The EC Commission has maintained that "the objective of this policy change has been to achieve a more consistent relationship between the guarantees and the market itself and to dovetail them into a long-term plan for rationalization of the farm sector."³⁴⁸

It is too early to assess the efficacy of the new guarantee threshold system in discouraging or significantly reducing the unwarranted production of various kinds of agricultural surpluses within the European Common Market. The EC Commission hopes that the new system of guarantee thresholds will lead to the introduction of a system of production quotas for various EEC farm products, and that the latter will impose a super-levy on any additional quantities of farm output.³⁴⁹ Although the EC Commission has called for adoption of a "prudent price policy" to narrow the gap between prices for farm products in the EEC and those charged by non-EEC competitors, especially in cereals,³⁵⁰ materialization also remains to be seen.

³⁴³ BULL. EUR. COMM. 63 (Supp. Jan. 1981).

³⁴⁴ BULL. EUR. COMM. 63 (Supp. Apr. 1981).

³⁴⁵ *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, 17 BULL. EUR. COMM. 13 (No. 3 1984).

³⁴⁶ Namely, for cereals, milk, colza, rape seed and processed tomatoes. Subsequently, sunflower, durum wheat, and dried grapes have been added to the list of farm products concerned.

³⁴⁷ Namely, those for sugar and cotton.

³⁴⁸ *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, *supra* note 345, at 13.

³⁴⁹ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 8.

³⁵⁰ *Id.*

Another important aspect of the operation of the EEC's CAP is the imposition of burdensome tariffs and quotas on imports of non-EEC farm products into the European Common Market. Other major trading nations of the GATT have also been known to do the same in similar circumstances. The United States, for example, has imposed quotas on imported dairy products and sugar.³⁵¹ However, the nature and extent of the EEC's tariffs and quotas on imported non-EEC farm products appears to be worse, they have been described as punitive.³⁵² To significantly reduce or remove most of its tariffs and quotas on imported farm products from its major non-EEC trading partners on a basis of reciprocity the EEC would have to negotiate uniform bilateral agreements with them. However, the EEC should be able to introduce a single nonreciprocal uniform system to ensure access of farm products from the Third World countries into the European Common Market.

The EC Commission has called for adoption of measures to rectify market imbalances caused, in particular, by imports of non-EEC cereal substitutes and vegetable oils.³⁵³ However, it has subsequently called for the negotiation of agreements with non-EEC countries regarding imports of various farm products from them. In relation to imports of non-EEC cereals, the EC Commission has sought a mandate from the EC Council to negotiate with non-EEC countries on stabilizing imports of cereal substitutes.³⁵⁴ Concerning milk and milk products, the EC Commission intends to reduce the quantity of butter imported from New Zealand.³⁵⁵ Furthermore, while the EC Commission has asked that a decision on the EEC's variable premium on lamb and mutton be postponed pending the outcome of negotiations with non-EEC countries regarding a minimum import price for the meat, it has proposed a downward revision of the import "balance sheet" for meat from non-EEC countries over a stipulated period.³⁵⁶

Regarding the thorny problem of grants of export subsidies for EEC farm products under the CAP, its adverse effects are felt by both, non-EEC countries and the EEC. To the EEC, the system is very costly. For example, out of an EEC farm budget of \$13.2 billion in 1984, \$4.6 billion was spent on "exporting food at less than it cost to produce."³⁵⁷ Such export subsidies unduly enable the EEC to increase its share in the inter-

³⁵¹ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

³⁵² *Id.*

³⁵³ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 8.

³⁵⁴ *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, *supra* note 345, at 14.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Bring Free Trade to the Farm*, *supra* note 4, at 71.

national agricultural trade and to obtain for itself some of the international agricultural markets traditionally controlled by its other GATT trading partners.³⁵⁸ The EEC's system of export subsidies is viewed as, unduly depressing world prices for agricultural products. There is an urgent need for the EEC to take positive steps to resolve the problem if a liberalization of world trade in farm products is to become a reality.

The close connection between the EEC's system of export subsidies and the existence of large surpluses of farm products in the EEC must be acknowledged. Realistically, it would be overly optimistic to expect the EEC to abolish the system over night. The gravity of the problem can be minimized by well-integrated EEC corrective or remedial measures under the CAP. The EEC's high prices for farm products on the European Common Market must either be drastically reduced, or quantitative controls must be imposed on the production of individual farm products in the EEC.³⁵⁹

The EC Commission has recently submitted some proposals for the envisaged change. First of all, the EC Commission believes that the EEC's new system of guarantee thresholds and, particularly, involvement of EEC agricultural producers in disposal costs of their products, will enable export of EEC farm products to be "developed on a sound basis."³⁶⁰ A reduction of the large surpluses of EEC farm products would be effective enough to minimize the harmful effects on world trade in agricultural products of the EEC's system of granting export subsidies for EEC farm products. Second, the EC Commission has stressed the need to prevent deterioration of world prices for farm products through closer international cooperation.³⁶¹ Stability in world prices for primary products, brought about by cooperation between all the contracting parties to the GATT, would make it unnecessary for the EEC to have undue recourse to its system of export subsidies for EEC farm products.³⁶²

Third, the EC Commission intends to promote exports of EEC farm products by concluding long-term contracts with its main non-EEC customers.³⁶³ By this measure it is expected that the actual or likely adverse effect of the EEC's system of export subsidies for its farm products on the

³⁵⁸ See, e.g., *supra* notes 270-87 and accompanying text (the complaint of ten GATT sugar producing countries against the operation of the EEC's sugar regime).

³⁵⁹ *Down on the Farm*, *supra* note 125, at 55.

³⁶⁰ *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, *supra* note 345, at 14.

³⁶¹ See *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 9.

³⁶² *Id.*; see also *Review of the Common Agricultural Policy and Adoption of Agricultural Prices for 1984/85*, *supra* note 345, at 14. For a similar suggestion, see *Cheap Dinners for Communists and Sheikhs*, *supra* note 227, at 46.

³⁶³ *Rationalization of the Common Agricultural Policy: The Commission's Proposals*, *supra* note 127, at 9.

stability of world agricultural markets and prices would be greatly reduced or rendered insignificant.³⁶⁴ Whether the proposals of the EC Commission will be fully endorsed and given legal force by the EC Council remains to be seen. They appear to be reasonable enough to merit serious attention and to be given a favorable response.

V. CONCLUSION

The economic, political and social significance of the agricultural sector of the economy to all governments cannot be underestimated. Farmers have, with the unstinting support of their national politicians and governments, been able to exclude or restrict imports of cheaper foreign farm products and prevent them from competing effectively with their own. The EEC has been particularly guilty of this conduct. The situation calls for meaningful and effective international measures for its correction or improvement. Yet attempts by the GATT, in the course of the Kennedy and the Tokyo Rounds of multilateral trade negotiations, to liberalize world trade in farm products have not been particularly successful.

However, the problem is not an insoluble one. Regular discussion of the main issues involved, within the general legal framework of the GATT, may be able to diminish or prevent the risk of yet more expensive trade wars, especially between the major agricultural trading nations. The EEC should be capable, on its own, to reform the operation of its CAP so as to render its effects on world trade in farm products less harmful to its other trading partners. Already, the EC Commission has made various important proposals to effect some drastic changes in the operation of the CAP. Yet, the national economic and political interests of the individual Member States of the EEC have prevented the EC Council from adopting and giving proper effect to the EC Commission's proposals. The constant disagreement among the Member States of the EEC, as to the character and operations of the EEC's CAP has aggravated the difficulties.

The lack of appropriate political will on the part of the individual member countries of the GATT and the EEC to make the necessary concessions to the organization and operation of the agricultural sector has frustrated the liberalization of world trade in farm products. Consequently, national and supranational protectionist measures regarding international trade in farm products abound. In the process, not only the agricultural interests of the developed market economies, but also those of the Third World countries have been adversely affected. The latter countries have been more seriously affected. After all, they are depen-

³⁶⁴ See, e.g., *Cheap Dinners for Communists and Sheikhs*, *supra* note 227, at 46.

dent mostly on the international sales of their farm products for export income.

A general spirit of political goodwill is necessary as well as a serious commitment on the part of the leading agricultural trading nations of the western industrialized world to effectively liberalize world trade in farm products. It can only be hoped that sooner, rather than later, a marked change in the attitudes of these nations will occur to bring about an improvement of the present situation.

